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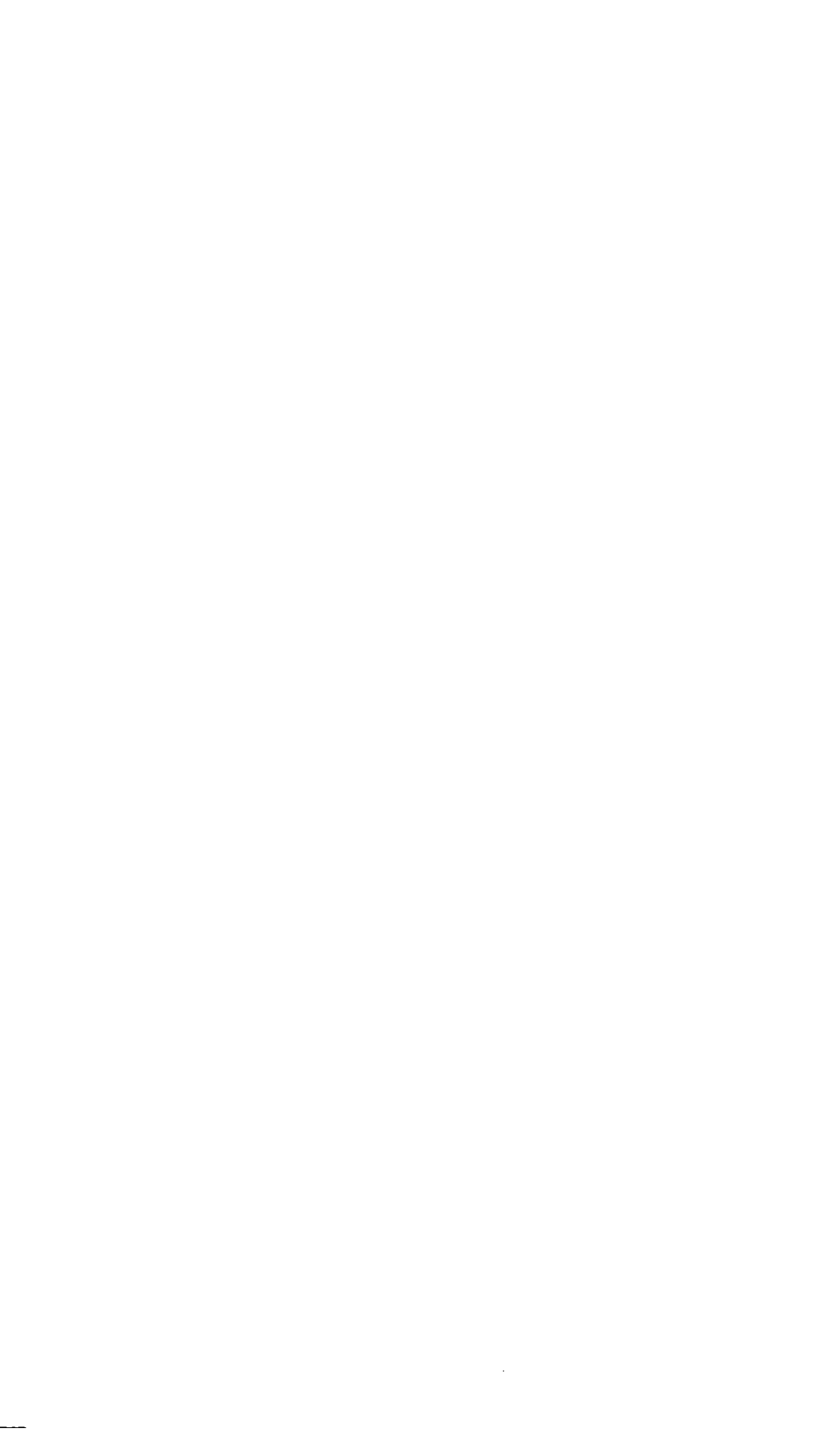
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Oct. 23

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VERMONT, SUPREME
REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

S U P R E M E C O U R T



STATE OF VERMONT.

VOLUME XVII.

NEW SERIES,
BY PETER T. WASHBURN,
Counsellor at Law.

VOL. II.

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JUDGES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.

HON. STEPHEN ROYCE,

HON. ISAAC F. REDFIELD,

HON. MILO L. BENNETT,

HON. WILLIAM HEBARD,

ASSISTANT JUDGES.

ERRATA.

Page 125, line 16 from bottom, after establishing read *the*.

- | | | | |
|--------|----|---|---|
| " 126, | 3 | " | top, for submitted read <i>submitting</i> . |
| " 127, | 9 | " | top, for 1843 read 1844. |
| " " | 5 | " | bottom, for breast read <i>beast</i> . |
| " 149, | 6 | " | bottom, for good read <i>given</i> . |
| " 493, | 20 | " | bottom, for charge read <i>change</i> . |
| " 512, | 10 | " | bottom, for made read <i>had</i> . |

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ESSEX,
MARCH TERM, 1842.

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PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE, } ASSISTANT JUDGES.
HON. MILO S. BENNETT, }

JAMES HOWARD V. ABEL EDGELL AND HORACE A. EDGELL.

IN CHANCERY.

Although mere inadequacy of consideration in a contract will not, of itself, substantiate a charge of fraud, yet when *gross*, and connected with other circumstances of a suspicious character, it may furnish sufficient ground to induce a court of chancery to rescind the contract.

Arbitrators, to whom is submitted a question in reference to the relative value of property, must, in their appraisal, keep strictly within the terms and requirements of the submission; and if they vary from, or exceed, the powers conferred upon them, their award will be void.

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Where the parties agreed to change farms, and submitted to appraisers to determine the amount which should be paid as the difference between them, and it was provided in the submission that the value of the orator's farm should be called \$5000, and that, if, in the opinion of the appraisers, the orator's farm was overvalued, or undervalued, the defendant's farm should be valued in the same proportion, and the appraisers, in making their award, ascertained the *real value* of the farms, and hence deduced the difference to be paid, without regard to the value fixed for the orator's farm in the submission, it was held that the award was void, as not having followed the submission, and would be set aside by a court of equity.

THIS was a bill brought to set aside a contract made between the parties for an exchange of lands.

The orator set forth, in his bill, that, in July, 1835, he contracted to purchase of Joseph Fry, of Concord, a farm in said town at the price of \$3000, and made several payments towards the purchase money, and took a bond from said Fry, conditioned, that, on payment of the last instalment of the purchase money, which was made payable in April, 1843, the said Fry should execute to the orator a warrantee deed of the premises, and that the orator entered into possession of said premises under said contract, and retained the possession thereof until the time of bringing this bill, and had, while in possession, made great and valuable improvements upon the farm and buildings, amounting to about the sum of \$700; and that, previous to the eighth day of May, 1839, the orator was the owner of another tract of land in the east part of said Concord, of the value of \$500.

The orator farther alleged, that on said eighth day of May, 1839, and at several times previous, the defendants represented to him that they were the owners of five farms in Charleston, in the County of Orleans, which they would exchange for the orator's lands in Concord, and that they would give to the orator good warrantee deeds of three of said farms, and that the defendant Horace A. Edgell would give a quitclaim deed of one of said farms, known as the "School Lot," and that the defendant Abel Edgell would give a quitclaim deed of the other of said farms, known by the name of the "Upper Melendy Lot"; that the said Abel said that that lot had been conveyed to him by a quitclaim deed, and that both of the defendants falsely

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and fraudulently declared to the orator that the said Abel had a good and perfect title to that lot, that there was no dispute about said title, that no one claimed the lot but said Abel, and that a quitclaim deed from the said Abel to the orator would vest in the orator the absolute title to said lot in fee simple; and that the orator, not knowing to the contrary thereof, but relying upon the said representations and affirmations made to him by the defendants, was thereby induced to enter into a contract, in writing, with said Horace, which was in these words; —

“ This agreement, entered into this day between James Howard, of the one part, and Horace A. Edgell, of the other part, witnesseth, — That the said Howard, of the one part, has sold to the said Edgell all his land in Concord, consisting of two hundred acres this side of the pond, which he now lives on, and one hundred acres situated on the west side of the pond, likewise one hundred acres lying in the east part of said town of Concord, with all the betterments, improvements and buildings thereon situated; the said Howard is to give a good and sufficient title of the same, on demand; this agreement entered into for the above mentioned land, the value of which is called five thousand dollars; the payment for the above land is to be made as follows. The said Howard is to take of said Edgell five farms in Charleston, Vermont, two of which were recently purchased of B. Pike, Esq., two by my father of S. Gaskill, and the remainder is called the “Allen farm,” or the “Weeks lot,” — it being all the land which said Edgell owns in said town, — which I, the said Edgell, agree to give a warrantee deed of, except the “School Lot” and the “upper Melendy lot;” these two lots I am to give a quitclaim deed of. The land at said Charleston is to be appraised by the following men, viz. Isaac Denison, Esq., Burke, Albert Lawrence, Charleston, and Capt. David Moulton, Concord; the price of said land is to be in proportion to the price of said Howard’s, which is five thousand dollars. If the said Howard’s land is under-valued, or over-valued, the said Edgell’s shall be valued in the same proportion, and the appraisers are to take into consideration that the said Howard is to have the use of all the land, both in Concord and Charleston, the present season, and is to leave, or give possession, the first of April next. Should there be found a

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' difference in the value of said property, the difference is to be paid
' on demand. In witness whereof we have hereunto set our names
' and seals this eighth day of May, 1839.

(Signed)

"JAMES HOWARD," (Seal)

"HORACE A. EDGELL," (Seal)

' Attest, OLIVER CHAMBERLIN,

' ABEL EDGELL."

The orator farther alleged, that, about the 19th day of May, 1839, the said Isaac Denison, Albert Lawrence and David Moulton met at Charleston to appraise the said five farms, and had put into their hands the sealed agreement, above set forth, as their authority and guide in making said appraisal; that, after having examined the lands in Charleston, the appraisers, on the 21st day of May, 1839, came to Concord, for the purpose of examining the orator's lands; that, in the course of that day, the said Isaac Denison had many private conversations with the said Abel Edgell, and after this the said Abel, or Horace, or both of them, pretended to doubt whether a valid award could be made concerning land, whereupon it was proposed by the said Denison, under pretence of preventing litigation between the parties, and of his own accord, or at the request of Abel Edgell, that deeds should be written of all the lands that were, by the agreement, to be exchanged, and that they should be properly executed and acknowledged by the respective parties, and be deposited with the appraisers, to be held by them until they had made and declared their appraisal, and that then, and not before, the deeds of the orator should be delivered to said Horace, and the deeds on the other part be delivered to the orator; that the orator and the said Horace A. Edgell mutually assented to this proposition, and that, accordingly, the said Denison wrote, and the orator executed, a warrantee deed of his Fry farm, and a bond to procure a deed of his land in the east part of Concord; that, at the same time, the said Denison wrote, and Abel Edgell executed, one of the warrantee deeds, which, by the agreement, were to be given by the said Abel, also a bond to procure from one Gaskill, in whom the title then was, a good and sufficient warrantee deed of the other lot, of which, by the agreement, said Abel was to give a warrantee deed, and also a quitclaim deed of the "Upper Melendy lot," above men-

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tioned;—and the orator averred that the said Abel had been before informed, and then knew, that he had no title whatever to the “Upper Melendy lot,” but that he concealed this fact from the orator, and, on the contrary, represented his title to be good, and thereby induced the orator to accept of a quitclaim deed of said lot;—and that Horace A. Edgell then executed to the orator a warrantee deed of one of the lots which he owned, and a quitclaim deed of the “School Lot,” so called;—and the orator averred that at that time the lease-hold title of said Horace to said “School Lot” had become forfeited by reason of the non-payment of rent, and that this fact was known to said Horace, but that he concealed it from the orator.

And the orator alleged that he assented to said proposition, made by said Denison, wholly with a view of thereby performing his agreement entered into with Horace A. Edgell, and that no request was ever made to him to vary the terms of said proposition, and that he never assented to any substitution of Abel Edgell in said agreement in place of said Horace, nor ever agreed to any submission with said Abel Edgell, nor ever consented to receive said Abel debtor for any difference that might be found by the appraisers in his favor between the said lands, but that, through *fraud, accident, or mistake*, the deed and bond executed by the orator were made running to said Abel Edgell instead of Horace A. Edgell; and he averred that no award was ever made by the appraisers between himself and Horace A. Edgell, in pursuance of the submission contained in the agreement of May 8, 1830, and that any award made by them, purporting to be an award between himself and Abel Edgell, was made without any submission, or agreement, to support it, and that whatever award was made was procured by the said Abel, or said Horace, by improper influences used with the appraisers.

The orator farther alleged, that, while the appraisers were at Charleston, Abel Edgell with a view to procure an unfair appraisal of one of the lots owned by him, which was a swamp, and of little or no value, procured one Saunders to offer the orator \$300 for said lot, that said Abel might inform the appraisers of such offer, and thereby induce them to appraise said lot far above its real value,

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and that the said Abel did afterwards, and before the appraisal was made, inform two of the appraisers that such an offer had been made to the orator; also that the said Abel endeavored to induce one Prescott to offer him \$500 for another of said lots, saying that he, Prescott, would not be obliged to take the land, and that the offer would be an advantage to him, the said Abel, and induce the appraisers to think that the said lot was valuable.

The orator farther alleged, that, after the said deeds and bonds had been executed and delivered to the appraisers, the said Denison, after having another private conversation with Abel Edgell, came into the room where the said Abel and the orator then were, and brought two papers, which he said were for them respectively to sign; that Abel Edgell signed the paper which was handed to him, without asking any questions, and that the orator signed the other paper, which was handed to him, without inquiring, or knowing, what it was, but supposing that the papers provided for some penalty in case either party refused to abide by the appraisal which was about to be made; that it appeared afterwards that these papers were notes, for \$1000 each, one of which was intended to be indorsed down by the appraisers to the amount due from that party as the difference between lands, and the other to be given up to the party signing it, but that the orator had no idea at the time that the papers were of that character, or were notes,—and that, claiming as he did that there was \$3000 difference between the lands, he would never knowingly have consented to the execution, for such a purpose, of a note for only \$1000.

The orator farther alleged that the said Denison, after he had obtained the said two notes, carried them to the two other appraisers, and told them that the orator did not consider that there would be much difference in the appraised value of the lands, and that, if the orator had thought there was a difference of three or four thousand dollars, he would never have consented that a note of only \$1000 should be given by said Abel to secure said difference; that the said Denison farther represented that the orator's land did not consist of near the number of acres mentioned in the agreement of May 8, 1839, and that the said Abel would not be satisfied, unless they reduced the number of acres and the estimated value; that all this

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was represented by said Denison, without any notice to the orator that the estimated number of acres, or their estimated value, were at all in question; that Denison, by his artful management, induced the other appraisers to concur with him in making an indorsement of \$633,33 on the note signed by Abel Edgell, leaving due thereon the sum of \$366,67; and that the appraisers then delivered to Abel Edgell the deed and bond executed by the orator, and delivered to the orator the deeds and bond which had been executed by Abel Edgell and Horace A. Edgell respectively, together with his own note, executed as above stated, and the note of Abel Edgell, indorsed down to the sum of \$366,67, as above set forth.

But the orator alleged that the agreement, executed between himself and Horace A. Edgell, May 8, 1839, had not been disposed of by the appraisers, but had been left by them in full force against him, and that Horace A. Edgell had never in any manner discharged nor executed any release of the same; and he claimed that the appraisers had not, in their appraisal followed the terms of the submission contained in that agreement, and that whatever appraisal they had made was absolutely void, as well for this cause, as for the fraudulent and collusive practices made use of in obtaining it.

And the orator charged that the said deed and bond, by him executed, were obtained from him through his ignorance, and want of counsel to advise him, and by the fraudulent and deceitful actings, doings and declarations of the said Abel and Horace and the misconduct of the said Denison.

The orator prayed that the said Abel Edgell might be decreed to execute to him a quitclaim deed of the orator's lands in Concord, and also to give up to the orator the bond executed by him to said Abel, and the agreement executed by the orator and Horace A. Edgell, and that Abel Edgell be enjoined from farther prosecuting certain suits which he had commenced at law against the orator, founded upon the said deed and bond, executed by the orator.

The defendant Abel Edgell, in his answer, admitted the execution of the agreement of May 8, 1839, between the orator and Horace A. Edgell, as set forth in the orator's bill, but averred that it was entered into at the request of the orator; he also admitted that examination of the lands in Charleston and Concord was made by

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the appraisers, substantially as alleged by the orator ; also, that, after this examination, it was proposed by one of the appraisers, in order to prevent future trouble, that the proper deeds and papers should be executed by the parties and deposited with the appraisers, as alleged in the bill, excepting that he averred that it was at the same time, and as part of the same proposition, agreed that a note should be executed by each party, to be also deposited with the appraisers, with authority for them to indorse down the note of the party, against whom a balance should be found, to the amount of such balance, and deliver the note, so indorsed, to the opposite party. He farther alleged that about this time, and before any papers were prepared, Horace A. Edgell proposed to him that he should take his place in the said contract, and that this defendant consented to do so, and that this was made known to the orator, who fully assented to the change ; but that, as the whole matter was then about being completed, it was not thought necessary to substitute any new writing for that of May 8, 1839 ; and that the writings were prepared by Isaac Denison, and executed, and left in the appraisers' hands, and that the appraisal was made and declared, showing a balance against this defendant of the sum of \$366,67, above mentioned.

This defendant farther alleged that he had no agency in determining the amount for which the said notes should be written, but that they were prepared by the said Denison without any dictation or suggestion on the part of this defendant, and without any intimation as to what the judgment of the appraisers was to be ; and he positively denied that he had, at any period, had any collusive understanding with said Denison, or any of the other appraisers, in reference to said appraisal, or any private interview with either of them with a view of influencing their determination, or that he had any intimation what their judgment was to be, until it was declared to both parties, or that there was any fraud ; or deception, practised, in procuring the substitution of this defendant for Horace A. Edgell in the performance of the contract of May 8, 1839. He admitted that the appraisers were not authorised, or expected, to deliver the deeds and bonds to the respective grantees, until they had determined the relative value of the Concord lands and the

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Charleston lands, upon the basis, assumed in the contract of May 8, 1839, that said Concord lands were worth \$5000; but he averred that the appraisers did make such determination, and publish the same in general terms, as above set forth.

This defendant denied that he represented his title to the "Upper Melendy Lot" to be a good title in fee simple, or that there was no dispute about it and that no one claimed it, but averred that he told the orator that he bought the lot of Silas Gaskill by a quitclaim deed, that said Gaskill had been in possession of it for a number of years, that large clearings had been made upon it, and that this defendant could only give such a conveyance as he had received,—and that the orator replied to this that he would go and examine for himself. And as to the contract of May 8, 1839, this defendant averred, that, the purpose of that paper having been carried into full effect, no formal disposition of it was considered necessary by either party, or by the appraisers, and that it was regarded as a contract fully executed and of no force and validity.

Exceptions being taken to the answer, this defendant answered farther, that he did not know that the orator read the note for \$1000, which was signed by him, or that any conversation was had with him, before the signing, in reference to the amount, but that the amount was told to the orator at the time he signed it, and that he signed it deliberately; that this defendant did not know that the orator read the note and bond which he executed,—but that he believed that they were read to him before signing, and that the orator specially instructed Denison, who drew the deeds, to substitute the name of this defendant in place of that of Horace A. Edgell; that the appraisers never did make any award, or appraisal, between the orator and Horace A. Edgell,—for that, after the substitution of this defendant, no such award was expected, or authorized; that this defendant did not, at the time of executing the quitclaim deed of the "Upper Melendy lot," inform the orator that there were any adverse claimants to that lot, nor that Gaskill had been threatened with a suit, to recover from him the possession of that lot,—but that he did inform him that Gaskill told this defendant that the person of whom he bought gave only a quitclaim deed; and he was unwilling to give any other, but that he believed the title

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to said lot was good, and that he should be willing to give a warrantee deed thereof, were it not that it would be breaking in upon his uniform practice of giving such deeds only as he received; and this defendant denied that he had ever been informed that he had no title to that lot, and he averred that he did not tell the appraisers whether he had, or had not, a good title to said lot; and he denied that he procured Saunders to offer to the orator \$300 for the lot mentioned in the bill, or that he endeavored to induce Prescott to offer him \$500 for the other lot, as set forth in the bill.

The answer of Horace A. Edgell was substantially the same with that of Abel Edgell;—and, especially, he denied that he had any knowledge, at the time he executed the quitclaim deed to the orator of the "School Lot," that the leasehold title to said lot had become forfeited by reason of the non-payment of rent which had accrued.

Many witnesses were examined upon each side as to the value of the Charleston and Concord lands in May, 1839, the average of whose appraisal appeared to be that the "Upper Melendy lot" was worth about \$325, that all the Charleston lands were worth about \$900, and that the orator's Concord lands were worth about \$3000, making a difference in their relative value of over \$2000, instead of \$366,67 as awarded by the appraisers appointed by the agreement of May 8, 1839. Testimony was also taken tending to show that Abel Edgell had never any title to the "Upper Melendy lot," and that the possession of that lot had, since the execution of the quitclaim deed from Abel Edgell to the orator, been recovered in an action of ejectment brought by the adverse claimants. Testimony was also taken in reference to the unfair practices of Abel Edgell, and the proceedings and management of the appraisers, the material parts of which are sufficiently stated in the opinion of the court, and need not be detailed here. It also appeared, that, since the appraisal, the defendant Abel Edgell had paid and become possessed of two of the notes executed by the orator to Joseph Fry upon the purchase of the Concord farm in 1835, mentioned in the bill.

The court of chancery ordered that the orator's bill be dismissed with costs; from which decree the orator appealed.

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N. Baylies and D. Hibbard, Jr., for orator.

1. By the submission the appraisers had two things pointed out for their consideration and accomplishment; the first and principal thing was to appraise the Charleston land according to the rules in the submission adopted by the parties; the second was to determine what rent the orator should pay for the use of the Concord land from the date of the submission to the first of April, 1840. The appraisers, to be governed by the submission, and to ascertain whether the price of the Concord land, \$5000, was an *undervalue*, or *overvalue*, should have agreed on the value of the Concord land; they should then have agreed upon the value of the Charleston land, and have calculated what its value should be called, in order to *overvalue* it in the same proportion in which the Concord land was overvalued by calling it \$5000;—that value having been fixed by the parties, the appraisers had no authority to alter it. When the appraisers had reported this their appraisal, they had done all that the submission required of them. They were not required to report the *difference*;—that the parties could ascertain for themselves. Watson on Arb. 54. Kyd on Awards 27. 17 Johns. 405. 6 Ib. 39.

Now have the appraisers done their duty? To ascertain this fact the appraisers have been interrogated upon oath. Isaac Denison says "that the appraisers never came to any agreement as to the value of any one of the five Charleston lots, nor as to the value of the whole together, that they never agreed upon any sum that the Concord lands were undervalued, or overvalued, nor as to the value of the rents and profits of the Concord land." David Moulton says "that the appraisers, before they made their award, did not agree upon any sum that said Concord lands were undervalued, or overvalued;—that the appraisers did not agree upon any sum, as the value of the five Charleston lots." It is manifest, from this evidence, that the appraisers have not appraised the Charleston lands according to the submission, and therefore their award, whatever it may be, is void. Wats. on Arb. 59. 7 East 81. 16 Ib. 57. 1 Barb. & Har. 184. 1 Saund. 33, n. 1. 1 Swift 468.

2. The award of the appraisers has no submission of the parties to support it, and was not called for.

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3. The award was not made between the parties to the submission. Kyd on Awards 42. Caldwell 99. Watson 55.

4. The award should be set aside, because it was obtained by the irregularity, corruption, or partiality, of Isaac Denison, one of the appraisers, and by the fraud of Abel Edgell, who acted as agent of Horace A. Edgell, one of the parties to the submission.

Abel Edgell wrongfully obtained possession of Howard's deed on the 21st day of May, 1839, and soon after Howard had placed said deed in the hands of Denison as an *escrow*, and before the appraisers had made their award, and caused the said deed to be recorded in the town clerk's office in Concord. That deed having been placed in the hands of the appraisers merely as an *escrow*, to await the making of the appraisal, and no appraisal having ever been made in pursuance of the submission, the appraisers had no authority to make a valid delivery of that deed, or of the bond; and the same are void for want of a delivery. 2. Bl. Com. 306-7. 4 Cranch 219. 2 Johns. 248. 11 Vt. 447.

It appears from the testimony that the Charleston lands, in May, 1839, were worth \$890; this sum, added to Abel Edgell's note of \$366,67, make the sum of \$1256,67. This sum is *all the consideration* which Edgell pretends he has made Howard for his Concord land, appraised by the witnesses at \$3016. The difference between the *consideration* and the value of the Concord land is \$1759,33. One half of the appraised value of the Concord land is \$1508, which is \$251,33 more than is paid for the whole of the Concord land. The civil law pronounced the sale of lands, for less than one half of their value, to be void for inadequacy of consideration; 1 Story's Eq. 250; but this rule is not the law of this court. An able writer on the law of this court says, "Though the inadequacy of price, when standing by itself, be not sufficient to induce a court of equity to set aside an agreement, yet, when connected with other circumstances, it may tend materially to assist the plaintiff in making a case of fraud. And even when standing *alone*, if the inadequacy of the consideration be so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without an exclamation at the inequality of it, a court of equity will consid-

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er it a sufficient proof of fraud to set aside the purchase. For there is a difference between *inadequacy*, and *evidence* arising from inadequacy;" Newland on Cont. 358. And see 2 Swift 47; 1 Barb. & Har. 152; 14 Ves. 214; 10 Cond. Eng. Ch. Rep. 406; 2 Sch. & Lef. 488, 492. 1 Aik. 390.

The evidence tends strongly to show partiality, or corruption, in Isaac Denison, one of the appraisers. If this be so, the award should be set aside. Wats. on Arb. 88-90. Kyd on Awards 358. 17 Johns. 405. 1 Barb. & Har. 565, 647-8. 1 Swift 472.

The fraud of Abel Edgell,—who acted as agent for Horace A. Edgell, and for whose doings Horace is responsible,—in concealing from the orator the fact,—known to himself,—that there were adverse claimants to the "Upper Melendy lot," and that his title thereto was disputable, vitiates the whole contract. Wats. on Arb. 91. 2 Swift 41. 1 Barb. & Har. 147, 149. 1 P. Wms. 239. Lawrence, one of the appraisers, and a witness, says, "that, if he had known before the appraisal that there were adverse claimants to that lot, or that Abel Edgell had no title to it, he would not have consented to the making said award." This declaration, by one of the appraisers, is sufficient cause for setting aside the award. Kyd on Awards 354. Caldwell 66, 67. Wats. on Arb. 91. When parties are making a contract, as between each other, it is a rule that a party may bind himself by a representation, as much as by an express covenant. 2 Sw. Dig. 41. 9 Ves. 21. 1 Ves. & B. 355. The words used in the contract of May 8, 1839, "*it being all the land which the said Edgell owns in said town,*" refer back to, and represent, that said Edgell was the *owner* of the five farms previously mentioned in the same agreement.

The agreement of May 8, 1839, contained a provision that Horace A. Edgell should pay to the orator, on demand, whatever difference might be found between the lands. This covenant was sufficient, and much better for Howard than Abel Edgell's note of \$1000 to secure the payment of \$3000. It is incredible that Howard should accept this note in lieu of the covenant. If he did, it proves that he was not capable of transacting his business. Although Abel Edgell swears that the giving of these notes was mentioned, as a part of the "proposition" assented to by the parties

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before the writings were made, yet Horace A. Edgell, who had an equal opportunity of knowing the truth, does not, in detailing in his answer the terms of that "proposition," mention the giving of the notes, and the testimony shows that it was not then spoken of. The truth is, these two notes were got into the case by the fraud and corruption of Abel Edgell and Denison.

At the time the deed and bond were executed by the orator, the equitable title to the Concord lands was in Horace A. Edgell by virtue of the contract of May 8, 1839; Abel Edgell had no legal or equitable title thereto, and the orator could not deed to him without violating his covenant to Horace. To suppose, then, that the orator would give his deed to Abel, without being discharged from his covenant to Horace, is either to suppose that he was *non compos mentis*, or that the deed and bond were obtained of him through *fraud, accident, or mistake*. It seems that he *did* thus execute the papers; but Abel Edgell should not be profited by this mistake, for he contributed largely to produce it. 2 Sw. Dig. 46. 1 Barb. & Har. 401, 563. 2 Sch. & Lef. 474, 492. 9 Cond. Ch. R. 415. 10 Ib. 406. 1 Russ. 485. 1 P. Wms. 239. And the evidence is wholly insufficient to prove the *arrangement*, pretended to have been made between Horace and his father, in reference to the substitution of the latter in place of Horace. But if any such arrangement ever was made, it was a *parol agreement*, merely, between Horace and his father, and was within the statute of frauds; for Horace was, in equity, the owner of the Concord lands, and could only convey his interest by writing. Sl. St. 166, §§ 2, 3. 2 Johns. 430. 15 Ib. 200, 502.

Isaac Denison, in writing the deed which was executed by the orator, inserted the sum of \$4500 as the consideration,—which was more than three times the actual consideration received. "The consideration of a deed may be such, as to show of itself that it was fraudulently obtained." 2 Sw. Dig. 46. 10 Cond. Ch. R. 406.

C. Davis for defendants.

The orator, in praying for the interference of this court, in setting aside and annulling a solemn and deliberate contract, between parties competent to contract, must do something more than show

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some little inequality in the contract,—which in truth exists in a greater or less degree in nearly all cases,—something more than ignorance in himself, or the appraisers, of some fact, or circumstance, which, if known, might have slightly varied the sum to be paid, something more than vague suspicions of conspiracy, if, perchance, one of the appraisers should be seen in conversation with the opposite party, something more, in short, than the failure on the part of the appraisers to adopt a rule of construction of the preliminary contract, which would have enabled the orator to perpetrate a meditated fraud upon the defendant, instead of one which obviously carried into effect the intentions of the parties, supposing such intentions to have been honest. There must, in general, be positive fraud, or constructive fraud, and this not merely suspected, but proved. 2 Story's Eq. 5, 6. 1 Ib. § 190. *Trenchard v. Warley*, 2 P. Wms. 166. 1 Fonbl. Eq., c. 2, § 8, note.

The appraisers were not arbitrators, but appraisers merely,—the sole matter submitted to them being to determine the value of the Charleston lands, in reference to a standard of value arbitrarily assumed by the parties as applicable to Howard's Concord lands, and to find the *real difference* in value, taking into consideration that Howard was to retain the occupancy of the Concord lands for nearly a year. So far as the sealed contract is concerned, no other matter was submitted to their judgment. Every thing else was to be matter of contract between the parties, either verbal, or written.

Circumstances which might induce a court of equity, in the exercise of a sound discretion, to refrain from aiding a party in carrying into effect a contract, will often be insufficient to procure a rescinding of that contract. 1 Fonb. Eq., c. 3, § 9, note (i.) 2 Story's Eq., §§ 693, 676, 770.

The first objection is, alleged misrepresentation by both of the defendants, during the verbal negotiations which preceded the execution of the contract of May 8, 1839, in reference to the title of Abel Edgell to the "Upper Melendy lot." We contend that such representations, even if they were made, would constitute no valid ground of relief, because the preliminary contract was afterwards reduced to writing, and was signed by the parties, and contained an express provision that that lot should be conveyed by a quitclaim

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deed only, without covenant of title. 1 Story's Eq. 168-178. 1 Fonbl. Eq., c. 3, § 11, note (a.) 1 Johns. Ch. R. 429. But it is not pretended that any error existed with respect to the title to the lot in question, either in the preliminary contract of May 8, 1839, or the final contract of May 21, 1839. *Hunt v. Rousmaniere*, 1 Pet. R. 1. In both it was clearly and distinctly understood that Abel Edgell would simply relinquish to Howard whatever title he had to the lot, together with the actual possession, without any guaranty as to the validity of that title.

Both Abel Edgell and Horace A. Edgell positively deny having represented Abel's title to said lot to have been valid beyond a doubt; and there is no testimony in the case to contradict this. Failing in this, the solicitors for the orator have endeavored to create a false issue; they are compelled to assume, that, if Abel had received any information tending to cast doubt upon his title, and did not communicate it to Howard, it would amount to a fraud and entitle the latter to a rescinding of the contract. This proposition cannot be maintained for a moment. The whole current of authorities is against it. Judge Story declares, that, however questionable the contrary doctrine may be in point of morals, it is too firmly established to be open to controversy. 1 Story's Eq., 216, 221. *Fox v. Mackreth*, 2 Bro. Ch. R. 420. It is always in the power of the purchaser to require a guaranty of the title, if he choose; if he waive this, and accept a mere acquittance of the grantor's right, he cannot complain, if it turn out that he acquired no valid title, though he parted with a valuable consideration therefor.

But we regard the evidence of want of title in Abel Edgell as incompetent and inconclusive; the most this court will do is to say that the title was doubtful,—1 Fonbl. Eq., c. 5, § 8, notes; *Prentiss v. Larnard et al.*, 11 Vt. 135,—which we admit, and which Abel expressly stated to Howard, in the course of the negotiation, was the fact. But, even if the title to one lot failed, it by no means follows that the orator can insist upon having the whole contract set aside. 15 Serg. & Rawle 45. 5 Bin. 362, 368. 3 Yates 6. 1 Fonbl. Eq. 372; note.

Another objection is, that no preliminary contract was entered into between Abel Edgell and Howard. But this position is met by

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a mass of testimony, both direct and circumstantial, perfectly conclusive.

After the explicit declarations of Horace A. Edgell that he considered the contract of May 8, 1839, as cancelled, or superseded, by the subsequent arrangement, we think Howard may safely dismiss his simulated fears that this contract may some day disturb him.

It is insisted that the appraisers did not proceed in the *manner* indicated in the contract of May 8, 1839. They supposed their only business was to find the honest difference in the value of the estates to be exchanged. If they had supposed the instrument had been formed in a manner to enable one party to perpetrate a gross fraud upon the other by a *catching bargain*, they would never have consented to have been made the instruments of effecting so dishonorable a purpose. We now understand the burthen of Howard's complaint to be, that the appraisers so construed their instructions, that he failed in accomplishing the fraud he meditated. It now appears by the testimony of Dr. Chamberlain, which could not have been suspected by the appraisers, that Howard intended, by the peculiar mode in which this part of the contract was moulded, to obtain an unfair advantage in the appraisal. Let us see how this cunning scheme would have operated, if permitted to have been carried out as designed. Suppose Howard's lands, estimated at \$5000, were estimated 100 *per cent.* too high,—thus making their real value \$2500; suppose the five lots in Charleston, adding the year's rent, were really worth \$1300; add 100 *per cent.* and it would bring them up to \$2600,—which, taken from \$5000, leaves a difference of \$2400. But the *real difference* in the value of the two would be only \$1200; and yet, by the mode of appraisal insisted on, if carried out, this difference is swelled to *double* that sum. Such is an exemplification of this beautiful plot for cheating according to rule, which a court of chancery is asked to sanction.

The arrangement in reference to the notes and deeds seems so perfectly natural and unexceptionable, that one would scarcely expect it to excite particular attention; notwithstanding the attacks upon it, it is a point entirely impregnable.

It is now well settled that mere inadequacy of price, however great, affords no ground for relief; it is merely a matter open to

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comment, and may constitute one among a thousand circumstances, from which fraud may be inferred. 1 Story's Eq. 241. 1 Fonbl. Eq., c. 2, § 9, note (d.) In this case the discrepancy is far from being what it is represented to be on the other side, and is far from coming up to the civil law rule, and cannot, therefore, be regarded as a substantive ground for interference.

The orator's bill abounds in charges and insinuations of improper influence exerted by Abel Edgell over one of the appraisers, and the imagination of the orator, or of his solicitor, seems to have been taxed to the utmost to find, or invent, circumstances light as air, and convert them into proofs of fraud. It would certainly be tedious to undertake to notice in detail these endless accusations, unsupported as they are, for the most part, by any reliable evidence, and frivolous as they would be, if proved.

The opinion of the court was delivered by

BENNETT, J. This case comes before us by appeal from the decree of the chancellor of the fourth judicial circuit. The object of the bill is to relieve the orator from the effects of his contract, and the *grounds* of this application, are fully set forth in his bill. The case is important to the parties; and the counsel are entitled to much credit for their industry, and the ability displayed in the argument.

To carry into effect the exchange of the lands, contemplated by the parties, an agreement, under seal, was entered into between the orator and Horace A. Edgell on the 8th of May, 1839, by which they were to have the Charleston lands appraised. By this agreement the value of the orator's lands was fixed at *five thousand dollars*. The appraisers were to appraise the Charleston lands in the *same proportion* in reference to their *actual value*, taking into consideration the fact that the orator was to have the use of both the Concord and Charleston lands until the ensuing April. In regard to the actual value of these lands; there is, as is common in such cases, considerable diversity of opinion. Taking the average estimate of some twenty two witnesses, examined on the one side and the other, we find that the orator's lands in Concord are estimated at about the sum of three thousand dollars. The average result of

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the estimate of the witnesses examined, (some seven or eight,) as to the value of the five several lots in Charleston, places them at about the sum of nine hundred dollars, though falling below. The sum awarded by the appraisers to be paid to the orator, upon the exchange of these lands, was three hundred sixty six dollars and sixty seven cents. The result is readily seen.

Though the contract of the 8th of May was made by the orator with Horace A. Edgell, preparatory to the exchange of these lands, yet it is claimed by the defendants, that, after there had been an examination of the Charleston lands by the appraisers, and while they were assembled at Concord to examine the orator's lands, and before any definite action had been had by the appraisers; there was a verbal agreement between the orator and the Edgells, that Abel Edgell should take the place of his son in the contract, and that things should proceed from that time, in carrying out the contract, the same as if Abel had been a party to it from the beginning, instead of his son. For the purposes of this case, we are disposed to consider such *parol* agreement as proved by the evidence, and to regard it as binding upon the parties; though we do not find it necessary to form, and much less to express, any definite opinion upon the point. We shall then proceed upon the assumed ground, that no objection can be made, because subsequent proceedings were had, and the award made, as between the orator and Abel Edgell. We are called upon to set aside this exchange of property, and to restore the parties to their original condition, as far as practicable.

The important inquiry is, *shall this be done?* It is not uncommon for a court of chancery to refuse to lend its aid to enforce a contract by reason of inadequacy in the consideration; but it is well settled that *mere inadequacy*, independant of and unconnected with other circumstances, is not sufficient, *per se*, to rescind a contract, unless its grossness amount to fraud. In the one case it is of itself sufficient; in the other it is to be considered with reference to the evidence, which is to be derived from it. There is no certain rule as to the degree of grossness, necessary to furnish in itself evidence of fraud. Lord Thurlow, in *Gwynne v. Heaton*, 1 Brown's Ch. R. 9, says, "it must be an inequality, *so strong, gross and manifest*, that it

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must be *impossible to state it* to a man of common sense, *without producing an exclamation at the inequality of it.*" This, in substance, is the rule, as laid down by other chancellors; and is, at best, loose and unsatisfactory, but too firmly established to be altered without changing the rules of property. Equity, which requires *equality*, should preside in all agreements. This is required by the pure morality of the gospel. Inadequacy in consideration renders the contract inequitable, and the principle of moral duty imposes the obligation of supplying the deficiency. In the case before us the difference is more than *two to one*; under the *civil law*, if, in the sales of immoveable property, the *inadequacy* of price was equal to half the value, the contract was, on that account, held vicious. Though the common law has not adopted this rule, still it has adopted rules, which, as applied to the evidence in this case, require this contract to be rescinded. The evidence presents other ingredients, to say the least, of a *suspicious nature*, which, connecting themselves with the *gross inadequacy of price*, materially assist the orator in making out a case.

The deed of the orator of his farm to Abel Edgell and the other deeds and writings were made out the day before the award of the appraisers was made, and placed in the hands of Isaac Denison, one of the appraisers, and not to be delivered over by him to the persons to whom they should belong, until the appraisers had determined the *relative* value of the lands upon the principles of the written submission, executed by the orator and Horace A. Edgell. This fact is established most fully by the answer of Abel Edgell, and by the other testimony. A standard value of *five thousand dollars* had been put upon the orator's lands by the agreement of the parties; and it was made the business of the appraisers to appraise the Charleston lands in the same proportion in respect to their relative and true value, taking at the same time into consideration the use which was to be reserved to the orator in the lands. Lawrence and Moulton, two of the appraisers, testify that they paid no attention to the valuation of the Concord lands, as fixed in the agreement, but appraised all the lands at such sum as they supposed to be their actual value. We find that the appraisers eventually fixed upon the

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ultimate difference, which should be paid by Edgell upon the exchange, as the average of the difference of each man's appraisal, upon the principles by which he was governed.

It is admitted by the counsel for the defendants, that, unless there has been an appraisal according to the spirit of the requirements of the written agreement, there was no authority vested in Denison to deliver over the deeds, which he held as *escrows*, and that they must fail for want of a legal delivery. It is, however, assumed by counsel, that the views of Moulton, as to the spirit of the contract, were correct, and the principles, upon which he and Lawrence proceeded in appraising the property, necessary, in order to prevent the advantages of a *catching bargain*. If we grant this position, it follows that the three appraisers should have come to a result by adopting the same principles. Denison, however, says he took Howard's lands at the assumed value of *five thousand dollars*, and appraised the Charleston lands in the *same proportion*, and thus obtained his result. Consequently, as the final result was obtained from the individual result of each appraiser, the *relative value* of the lands has never been determined, either upon the one principle, or the other. It is, however, very clear that the written submission required the appraisers to value the Charleston lands according to a given standard, and thus furnish premises for a result, not showing the *actual*, but a *hypothetical* difference in the lands.

It is said that this gives the orator an unconscionable advantage in the appraisal. It may be so, but what then? It does not follow that the court can make a different submission for the parties, nor that they would aid the orator in carrying into effect, or retaining, an exchange predicated upon such an appraisal. All the powers of arbitrators are derived from the submission of the parties; and so it must be with these appraisers. 17 Johns. 405. The result must be, that, the appraisers not having kept *within* their powers, their award, upon which the exchange is predicated, is void.

It cannot be disguised, that the proceedings in this case present some, at least, of the appraisers in an unfavorable light. It is quite remarkable that both Moulton and Denison should have adjudged the difference, which Edgell should pay upon the exchange, only *fifty dollars*, when an average of a large mass of testimony be-

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fore us shows the actual difference in the value of the lands to be more than *two thousand dollars*; and especially when Denison tells us that he took, as his basis, the Concord lands at their assumed value. This tends strongly to show *gross partiality*. We have also the testimony of George W. Denison, that Isaac Denison told him that Edgell was getting "*an all-fired great trade out of Howard*"; and that Howard was very much worried about it." This conversation Mr. Denison thinks took place at Burke, when the appraisers were on their way from Charleston to Concord; and, in the same conversation, he testifies that Isaac Denison said he had got to go down to Concord and make the writings, as Edgell would have no one else do it. Isaac Denison, however, in his testimony, says he has no recollection of ever having any conversation with G. W. Denison, or any one else, upon the subject of his making the writings, before he went from Burke to Concord; and says he did not tell G. W. Denison, or any one else, soon after his return from Concord to Burke, that Abel Edgell *had cheated* Howard, nor any thing of the kind; but he does state that after the appraisers had been at Charleston, and before they went to Concord, he told G. W. Denison that Edgell was making "*a great trade*" with Howard, and that he was surprised they should leave it to men. But whether he got "*a great trade*," if by this was meant an unequal bargain, must depend upon the result of the appraisal; and we find this same Mr. Denison fixing the boot money at *fifty dollars*. It is urged by the defendants, that most probably G. W. Denison must be mistaken as to the time of the conversation with Isaac Denison; and that it was after the return of the appraisers from Concord. This might seem probable; but if so, it would not help the case. If Denison made the expression, imputed to him by G. W. Denison, after the appraisal was completed, it shows that he did not act his judgment in making it.

It appears that the deed from Howard to Edgell, of his farm, was put on record the 21st of May. If there is no mistake in the date of this record, it must have been done before the award was made. All agree that the award was made on the 22d of May. Denison says he delivered over this deed, after the award was made, with the other deeds and writings. It is most probable there was a mis-

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take in the Town Clerk, in the day of the month on which it was filed for record. In the testimony of E. D. Goodwin it appears, that, in conversation upon the subject of the trade with Mr. Gilkey, Abel Edgell said, he and Denison were old settlers together, that there had always been a good understanding between them, and that he was not afraid to submit the case to him. All that can be said of this is, that it goes to show a personal friendship, and, in connection with other testimony, may tend to establish an improper partiality.

In regard to the "Upper Melendy lot," one of the five Charleston lots, it is quite clear that Abel Edgell had no title to it. The title was in the heirs of Asa Mathewson, and his administrator, at the Orleans County Court, December term, 1839, recovered the possession of it. Silas Gaskill testifies, that, in 1838, when he bargained with Edgell for this and other lots, he told him he could only give him a quitclaim deed of this lot,—that it was all he had of it,—and that there were *adverse claimants* to it, &c. Brigham Pike states, that, in the spring of 1838, he examined the title of Silas Gaskill to this lot, found it disputable and doubtful; and that, upon being enquired of by Abel Edgell, why he did not buy it of Gaskill, he assigned to him *this*, as the reason. He also says, that this conversation with Edgell was while he lived at Concord, and before he removed to Derby in April, 1839. Edgell, it is true, in his answer, denies that he was informed by Gaskill that there were adverse claimants to this lot at any time, before he gave his quitclaim deed to Howard; and also denies that he was informed by Pike that the title of Gaskill was doubtful *within the time specified*. It is consistent with the answer that he was subsequently informed of it. The fact that Gaskill had no title was readily discoverable upon an examination of the records in the Town Clerk's office; and we think, in view of the evidence and the nature of the case, that Edgell is chargeable with notice, before his deed to Howard, that Gaskill's title, and of course his own, was invalid.

* The purchase of this lot, though Howard, by the contract of the 8th of May, was to have but a quitclaim deed, was not a bargain of hazard as to title. He was to pay its full value; and had the right to expect an equivalent. Abel Edgell, in his answer, says that

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Gaskill told him, that the person of whom he bought gave only a quitclaim deed, and that he was not willing to give any other, but that *he believed the title good*, and that he should be willing to give a warrantee deed, were it not that it would break in upon his uniform practice of giving such deeds only as he received. He says he informed Howard of whom he bought the lot, of the kind of deed he had taken, and the substance of what Gaskill had told him, and that he himself did not know whether the title was good or not. Howard, then, was assured that Gaskill believed the title good, and that it was not on account of any doubts as to title, that he could only give a quitclaim deed; and that Edgell himself did not know about the title. Whereas, Gaskill says he told Edgell there were adverse claimants, of the name of Mathewson, as he was informed when he bought,—that he had been threatened with a suit, though none had been commenced, and he did not believe any suit would be commenced. This information he says he gave Edgell, at the time he traded with him, and he thinks, also, the substance of it about a year before that time. Edgell not only *suppressed* the information, which we think he had as to the defect of his title; but, in representing that Gaskill thought his title good, and that he had no objection to giving a warrantee deed but his practice did that, which was calculated to quiet any examination as to the title on the part of Howard. That Howard supposed he was to get a title to this lot no one can doubt. The average value of the lot, by the witnesses examined, is about three hundred and twenty dollars. With a deduction of this lot, it would leave the value of the Charleston lands, received by Howard on the exchange, less than six hundred dollars.

If Prescott's evidence, in regard to his being solicited to make Edgell an offer for the Gilman lot, and that of Saunders, in regard to the offer which he says he made for the Allen lot, can be relied upon, they do furnish evidence of a device on the part of Edgell to obtain an *over appraisal* of the Charleston lands. These witnesses, however, are opposed by the answer of Edgell; and it may be difficult to determine how the facts in this particular were.

In the case of *Brown v. Sawyer*, 1 Aik., 130, the rule is laid down, that gross inadequacy of price is evidence from which a jury

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may presume *fraud*, or mistake, if there be no circumstances in the case, which rebut the presumption. Though it should be held, that *mere inadequacy* of price will not of itself substantiate a charge of *fraud*, yet, when gross, and connected with other *circumstances of suspicion*, (as in the case of weakness of intellect, not amounting to insanity,) it may furnish satisfactory ground for relief, especially in a court of equity. When we take into consideration the gross inadequacy of price, the fact that no award of the appraisers was ever made upon the principles contained in the contract of submission, and the many ingredients, to say the least, of a suspicious nature attending the case, we have no doubt that the orator, Howard, should have relief.

This Court, then, advise that the decree of the Chancellor be reversed, that the deed of the orator of the 21st of May, 1839, of his Concord farm, to Abel Edgell, be held *null* and *void* to every intent and purpose; and that Edgell, and all persons claiming under him, be perpetually enjoined from setting up any title to said premises, and every part thereof, under said deed, both at law and in equity; and that they and each of them be restrained from using said deed as evidence in a court of law, or equity; that the bond of the orator to said Abel, under date of 21st of May, 1839, specified in the bill, be delivered up by said Abel to the orator to be cancelled; and that the said Abel be perpetually enjoined from having and maintaining any action, or actions, on any of the covenants in said deed, or upon said bond, or for the seizin and possession of the lands specified therein; and that the defendants pay to the orator, by a time to be fixed by the Chancellor, the costs in the Court of Chancery, and also the costs in this Court.

It is farther *advised* that the two deeds from Horace A. Edgell to the orator, and the three deeds from Abel Edgell to him, specified in the bill, of the Charleston land, be held void, and of none effect to pass the title to said lands, or to give an action on the covenants therein contained, and that the note of one thousand dollars of the said Abel to the orator, endorsed down to \$366,67, be held null and void and of none effect. Provided, however, the decree is to be of no effect, unless the orator shall pay to the clerk of the Court, for

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the use of the said Abel Edgell, by a time hereafter to be fixed by the Chancellor, such sum as the said Abel paid on the orator's notes to Joseph Fry, and the interest on the same, the amount of which is to be ascertained by the Chancellor, and this cause is remitted to the Court of Chancery, that it may be proceeded with accordingly.

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR,
JULY ADJOURNED TERM, 1843.

PRESENT.

HON. STEPHEN ROYCE,
HON. MILO L. BENNETT, } **ASSISTANT JUDGES.**
HON. WILLIAM HEBARD, }

THOMAS GRIFFIN v. ISAAC TYSON, JR.

If G. and T. enter into an agreement, by which G. is to labor for T. and be boarded by him in a particular way, or at a certain place, G. has no right to procure his board in a different way, or at a place not designated between them, and charge T. therefor, without showing some failure in performance on the part of T.

When a person indebted to another makes a tender of the sum due, which is refused, and an action is afterwards commenced before a justice of the peace, the party making the tender must plead it specially at the trial before the justice, if he intend to rely upon it;—it is not sufficient that he offer to produce the money before the justice, but neglect to do so, in consequence of the other party's saying to him that that was not what he wanted, that he wanted more, and that it was of no consequence,

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BOOK ACCOUNT. The action was commenced before a justice of the peace, and came to the county court by appeal: an auditor was appointed, who reported as follows.

The plaintiff presented an account against the defendant for one month's labor, charged at \$10,00, and for his board during the month, charged at \$6,45. It appeared that the labor was performed by the plaintiff in pursuance of a contract between the parties, and that, by the contract, the defendant was to board the plaintiff while he was at work, and that the defendant told him that he might board at the defendant's boarding house, with one Fitzgerald, or with the plaintiff's mother. The plaintiff bought provision of the defendant, and procured his mother to cook his board during the time he performed said labor. It appeared that the plaintiff's mother was indebted to the defendant to the amount of \$6,00 or \$7,00, at the time the plaintiff agreed to labor for him.

The plaintiff had an account against the defendant, which was not disputed, of \$1,93; and it was proved, that, sometime before the commencement of this suit, the defendant tendered to the plaintiff the sum of \$8,22,—which was more than the balance then due to the plaintiff for the one month's labor, with the interest which had then accrued. It was farther proved that the defendant carried the tender to the justice's court, told the court the amount of the tender, and offered to produce it, but did not produce it, in consequence of being told by the plaintiff's counsel, in relation to the tender, "that it was not what he wanted,—he wanted more,—it was of no consequence." It was conceded that the amount of the tender was brought into the county court the eighteenth day of the term at which the appeal was entered.

The county court disallowed the plaintiff's claim for board, and adjudged the tender sufficient, and rendered judgment for the defendant. Exceptions by plaintiff.

S. Fullam for plaintiff.

I. We insist that the plaintiff can recover for the board charged;

1. Because the defendant was benefited to the amount of \$6,45 by the plaintiff's boarding himself, and the plaintiff can recover for it in no other way.

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2. The defendant is bound to know, if he is receiving the daily benefit of the plaintiff's expenditure.

3. The defendant never contracted with the plaintiff's mother to board the plaintiff, but merely told him that he might board there; and the plaintiff adopted the only feasible way of doing so.

II. If we are wrong in this, we still insist that we are entitled to a judgment, notwithstanding the tender;

1. Because the defendant did not bring the tender into the justice's court, nor prove that any such tender had been made. Chit. on Cont. 308. *Pratt v. Gallup*, 7 Vt. 344. *Chipman v. Bates*, 5 Vt. 143.

2. It does not appear that the tender was made at the time, nor after, the debt was due. *Kingman v. Pierce*, 17 Mass. 247. *Jouett v. Wagnon*, 2 Bibb 269.

3. What was said by the plaintiff's attorney at the trial before the justice might have excused the defendant from producing the money, had it taken place at the time the tender was made, but cannot excuse him from bringing the money into court, and leaving it in the custody of the court, that the plaintiff may receive it at any time before the copies for the appeal are taken out.

4. The money tendered should be taken with the copies and lodged with the clerk of the county court the first day of the term, that the plaintiff may at any time take it if he wish.

R. Washburn for defendant.

1. The defendant insists that the contract between the parties, as shown by the case, gave the plaintiff no right to board himself and charge the defendant for it. By the contract the defendant was to board the plaintiff, and he told him that he might board at the defendant's boarding house, or with the plaintiff's mother, who was then indebted to the defendant to the amount of the board.

2. The defendant insists that the tender, as shown by the case, was good and sufficient. *Douglass v. Patrick*, 3 T. R. 683. *Thomas v. Evans*, 10 East 101. 2 Wash. C. C. Rep. 15, [3 Pet. Dig. 626.] *Blight's Ex'rs. v. Ashley*, Peter's C. C. Rep. 15, [3 Pet. Dig. 626.] 6 Bac. Abr. 464. Esp. on Ev. 112.

3. The defendant insists that the tender was brought into the

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county court in sufficient season. *Birks v. Trippet*, 1 Saund. R. 32, n. 2. *Kilwick v. Maidman*, 1 Burr. 59. *Noone v. Smith*, 1 H. Bl. 369. *Pratt v. Gallup*, 7 Vt. 348.

The opinion of the court was delivered by

HEARD, J. But two questions have been made. The first is whether the plaintiff ought to be allowed his charge of \$6,45 for boarding himself while at work for the defendant. It appears, from the report of the auditor, that the defendant was to board the plaintiff, while working for him, and that he designated several different places where he might board, and, among others, told him that he might board with the mother of the plaintiff, at whose house it appears he did board, but not in the family of his mother; but the plaintiff furnished his own provisions, and his mother cooked them for him.

The plaintiff could not, in violation of the contract with the defendant, that he should be boarded in a particular way, or at a certain place, procure his board in a different way, or at another place, not designated, at the defendant's expense, without showing some failure on the part of the defendant. It does not appear that the defendant knew that the plaintiff was furnishing his own board, nor that the defendant had neglected to furnish board in the manner agreed upon. We therefore think that the court did right in rejecting that item in the plaintiff's account.

The auditor finds due to the plaintiff, after disallowing the aforesaid item, the sum of \$8,07, and reports that the defendant, before the commencement of this suit, tendered to the plaintiff, a sum sufficient to cover this balance, and the interest. The remaining question is, did the defendant, after being sued, keep his tender good, so that he can rely upon it in defence of this action. There has been a good deal of speculation on the subject of tender. Not only what constitutes a good legal tender, in all its *niceties* and *particularities*, but also what will excuse the party making the tender from the observance of all those *legal requisites*. But where the tender has once been made in a manner satisfactory to the law, and refused, it then becomes the duty of the party making the tender to keep it good, so that the party to whom it is made can have it, if he

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signifies a willingness to receive it; and if a suit is commenced, the defendant must plead the tender in bar of a recovery, if he intends to rely upon it, and if he do not thus plead it, but proceed to trial upon the plaintiff's cause of action, it will be regarded as a waiver of the tender.

The auditor has reported that "the defendant brought the tender" to the Justice Court, and told the court the amount of the tender, "and offered to produce it, but did not, in consequence of being told by the plaintiff's counsel, in relation to the tender, that it was not what he wanted,—he wanted more,—it was of no consequence." This is relied upon as an excuse for not pleading the tender,—but, as I think, without reason. It was a mere repetition of the plaintiff's refusal to accept the tender. Nothing is said by the defendant about pleading it; and nothing is said by the plaintiff to excuse him for not pleading it.

The auditor farther reports, "that, if the tender was legally pleaded," he finds &c. We might with more propriety inquire whether it was pleaded at all. The auditor has reported no fact in relation to it. The authorities, when carefully examined, will all appear to be harmonious on the subject, that the tender, if the defendant would rely upon it, must be pleaded. There is a single *dictum* in *Espinasse's Nisi Prius*, that the defendant need not produce the money in court, if the plaintiff "refuse to receive it." But this is said under that division of the subject which relates to the pleading the tender;—and the very text, from which this is extracted, lays down the doctrine, that, if the defendant would derive any advantage from his tender, he must plead it. •

The case of *Douglass v. Patrick*, 3 T. R. 683, is relied upon by the defendant. But the question in that case was not as to the necessity of *pleading* the tender,—but it was whether a legal tender had been made. The tender was pleaded, although made informally; and the court, in that case, thought that the defendant was excused by the plaintiff from observing all the requisitions of the law in making a tender.

Taking the report of the auditor for a guide on this subject, we come to the conclusion that the tender was not pleaded at the justice's court. He not only does not find the fact that the tender was

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pleaded, but he does find other facts from which it would be reasonable to infer that the fact does not exist. This tender, then, from any thing that appears, was well made;—still, in the subsequent proceedings, it was not so relied upon, that the defendant can take any benefit from its having been made; and to hold differently would be an inexcusable departure from the *sakutary* and *well established* rules of pleading.

The judgment of the County Court is reversed, and judgment is rendered upon the report for the plaintiff to recover the sum of \$8.07.



SAMUEL BLODGETT v. TOWN OF ROYALTON.

[Same Case, 14 Vt. 288, 16 Vt. 497.]

When a new road has been laid and worked in a town, the discontinuing the old road, by the selectmen, and the leaving the new road open for travel, and thus compelling the travel to go upon the new road, are acts so unequivocal in their character, and so inconsistent with any other rational intent of the selectmen, than that the road shall be an open highway, as to be *legitimate evidence* that the road has been opened by the town and devoted to public use, so as to make the town liable for any damages arising from the insufficiency, or want of repair, of such road.

And it makes no difference that the fences across the new road were first torn down, and the road thus opened, by some other person, if the selectmen, after learning the fact, and after shutting up the old road, suffer the travel to go upon such new road, without providing any other place to travel.

TRESPASS ON THE CASE for damages to the plaintiff's horses and carriages, resulting from the insufficiency and want of repair of a highway in Royalton. Plea, the general issue, and trial by jury.

On trial it appeared, that, at a session of the Supreme Court at Chelsea, in the county of Orange, in March, 1837, a highway, duly surveyed and laid out by a committee appointed by that court, was established in the towns of Royalton, Bethel and Randolph. In the summer of 1837 the town of Royalton appointed a committee to let

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out the making of that portion of said highway within their limits, and they let out the same in sections, which were all completed, and accepted by the said committee, in November, 1837. The selectmen of the town then examined the road, but concluded not to open it for travel that year,—the fences then being across the road ; but the fences were, by travellers, taken down, and the public travel went on to the road, that autumn, and has continued to go there ever since.

In April, 1838, the selectmen of Royalton were called out, on a petition of the inhabitants, to discontinue the old road, of which the new road was an improvement, and a majority of the selectmen decided to discontinue it, except a small part at the south end, which was reserved for the use of the inhabitants on that part, and thereupon the old road was fenced up by the inhabitants and land owners thereon, and has never since been repaired, or used, as a public highway, though travellers, and the plaintiff's stages, have occasionally passed that way, by taking down the fences, when the new road was out of repair,—and especially in the spring of 1838.

The selectmen did not deliver any certificate of the discontinuance of the old road to the town clerk, for record until April, 1839 ; and they have never left with him any certificate of the opening of the new road. When the majority of them, in April, 1838, decided to discontinue the old road, a land owner, who had fenced up the old road, finding his fence taken down by travellers, or stage drivers, applied to one of the selectmen, who informed him that the road was discontinued ; whereupon he put up and kept up his fence.

In the spring of 1838 the selectmen, with the other highway survey bills, made out and delivered one to one Fowler, a highway surveyor ;—the bill not describing the roads in his district, he soon afterwards applied to one of the selectmen, who informed him that he must lay out the taxes in his bill on the said new road ; which he did that season.

At the May Term of Windsor county court, 1838, an indictment was found against the town of Royalton for the insufficiency and want of repair of the said new road, and, at the November Term, 1838, a fine was assessed therefor on the town by the court, which

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was duly collected, and was, under the direction of an agent appointed by the court, laid out in the repair of the road in 1839; and the road has ever since been maintained by the town.

The plaintiff gave evidence tending to prove that the said new road became much out of repair, by deep ruts, in November and December, 1837, and that, in running his stage thereon, one of his horses had a leg broke in December, 1837, by reason of the said want of repair; that about the middle of May, 1838, another of his stage horses was badly injured, and another in June, 1838, and that his carriages were also injured,—all by reason of the insufficiency of the road.

The defendants gave evidence tending to prove that the plaintiff's stage driver, in November, 1837, took down the fence across the new road, and drove the plaintiff's stage through on the road.

The defendants requested the court to charge the jury,—1, That the plaintiff could not recover, because no certificate of the opening of the new road had ever been made and recorded; 2, That the discontinuance of the old road could have no effect until recorded, in 1839; 3, That if the plaintiff's driver took down the fence across the new road in 1837, before the selectmen had opened the road, and so opened a passage for the travel, and for heavy teams, on to that road, whereby the same had become deeply rutted, and whereby the plaintiff had suffered damage, he could not recover for such damage.

The court charged the jury that the opening a highway, so as to render the town liable for damage for its insufficiency, could not be produced by the act of a private individual. That it must be by the certificate of the selectmen, duly recorded, or by some other act of the selectmen, unequivocal in its character, and clearly inconsistent with any other honest intent, than that the road should be an open highway; or there must be some corporate act of the town to the same effect. That, this road being in fact in use in April, 1838, the decision of the majority of the selectmen to discontinue the old road, and the fencing up the same, as shown, was such unequivocal act, which had never been repudiated, but had ever since been conformed to and sanctioned by the town, in maintaining the new road as the only main and stage road. But that the town were only lia-

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ble for such damages as had happened to the plaintiff, from the insufficiency of the said road, after the decision of the selectmen and the fencing up of the old road in April, 1838; and that for such damage the town was liable, regardless of who first took down the fences on the new road.

The jury returned a verdict for the plaintiff. Exceptions by defendants.

T. Hutchinson for defendants.

We contend, that, if the discontinuance of the old road would be equivalent to a record of the opening of the new road, (which we do not admit,) surely a decision of the majority of the selectmen, in the spring of 1838, to discontinue the old road, which decision was not put upon paper, nor upon record, until 1839, could have no such effect.

Hence we contend, 1, That the town are not liable for damage done before the opening of the new road by the record required by the statute; and 2, That no substitute arises from the proof about discontinuing the old road,—especially in favor of the plaintiff, who was an inhabitant of the town.

3. We contend that the instructions of the court to the jury, and their refusing to instruct as requested, gave the plaintiff the full benefit of his own wrong,—himself, by his teamster, opening the new road, and causing all those ruts, and the want of repairs, of which he complains.

Tracy & Converse for plaintiff.

That the charge to the jury was correct was virtually decided by this court, when the same case was before them at the Feb. Term, 1842. [14 Vt. 288.] The decision then made is based upon the clearest principles of reason and common sense, and is sustained by the most obvious considerations of justice and public policy.

That the evidence admitted was such as tended to show a recognition of the road as a public highway by the town, and by its officers, appears to us incontrovertible.

If any thing, short of the record of the selectmen, could be evidence of recognition, that described by the judge in his charge was such.

Bledgett v. Royalton.

The opinion of the court was delivered by

HEBARD, J. This case has once before been to this court, and so far as this question was then considered by the court, it must be regarded as settled. The defendants seek immunity from the liability imposed upon towns for damage sustained by individuals by reason of the insufficiency of a road, upon the ground that the selectmen had not caused a certificate of the opening of the road to be recorded in the town clerk's office. And this brings up the inquiry, whether there is any other way in which this liability can be fixed upon a town. If this was a road that the town of Royalton was "liable to keep in repair," then the town, by the statute, would be "liable for damages happening through the insufficiency, or want of repair, of the road." It has been repeatedly held that a public highway may be created by adoption, and, by such adoption and use of it, the owner loses his right to fence up and control the use of the land. And when this court had this case under consideration before, it was expressly so held by the court. If that point is established, it only becomes necessary to examine whether the charge of the County Court upon this point was a departure from this rule.

The court charged the jury that "the opening of the road could not be effected by the act of an individual,—but must be by the certificate of the selectmen duly recorded, or by some other *act* of the selectmen, *unequivocal in its character*, and clearly inconsistent with any other honest intent, but that the road should be an open highway; or there must be some corporate act of the town to the same effect." This charge of the court must be correct, if any thing short of the record is to have the same effect.

But it is said that there was no such *unequivocal act* of the selectmen. The case finds that this road, *de facto*, was laid open in the fall of 1837, and was then travelled, and was afterwards continued to be open and travelled; and that in April, 1838, the selectmen, *de facto*, discontinued the old road, and caused it to be shut up, leaving no open way for the travel to pass, except upon this new road. And the case farther finds, that, by direction of one of the selectmen, a portion of the highway tax was laid out upon this new road in June following. These acts could hardly be called *equivocal*.

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There could have been no different views entertained of them by those who witnessed them. If this is so, if the selectmen intended, by shutting up the old road and permitting the new road, after having made it, to remain open, and become, as it in fact did, the thoroughfare for the public travel, and the town acquiesced in this proceeding and arrangement of the selectmen, I think the town may with propriety be said to have adopted this road, and to have become liable to keep it in repair.

There is one farther objection to the charge of the court. The court instructed the Jury "that the town was liable only for such damages as had happened to the plaintiff from the insufficiency of said road, after said decision and fencing up the old road, in April, 1838, and that for such damage, the town was liable, regardless of who first took down the fences on said new road." The defendants offered testimony tending to prove that the plaintiff's stage driver took down the fence, on said new road in November, 1837, and drove the plaintiff's stage through on said road. This has no tendency to change the character of the transaction. It was not the first taking down the fence, but it was the shutting up the old road and permitting the new road to *remain open*, that was characteristic of the intention of the selectmen. The fence might as well have been taken down by the plaintiff as by any other person. When the selectmen shut up the *old road*, and thereby compelled the travel to go upon the new road, and left that open, and made no other provision for the public, for all the purposes of this inquiry it became their act, and the town, by acquiescing in it, have adopted the road and made it their own.

Judgment affirmed.

Roberts v. Warner.

JONATHAN D. ROBERTS v. JOEL WARNER.

In an action of *scire facias* upon a recognizance for a review the plaintiff can recover, as damages, whatever he has lost by the delay occasioned by the review, together with additional cost, [but when there has been no loss of principal, there can be no recovery of interest.]

Therefore where the debtors, at the time of the rendition of the judgment, from which the review was taken, were totally insolvent, and so continued until the time final judgment was rendered, it was held that interest could not be recovered, as "intervening damages," on *scire facias* against the recognizor for the review.

SCIRE FACIAS upon a recognizance entered into by the defendant upon the review of a cause in favor of the present plaintiff against Stephen Cummings and Edward Manning. Trial by the court.

On trial it appeared, that, at the time the plaintiff recovered the judgment, from which the review was taken, the said Cummings and Manning were entirely destitute of property, and have ever since so remained.

The plaintiff claimed that he was entitled to recover, in this action, the additional cost accruing in the original action after the review, and also the interest upon the debt sued for in that action, which accrued from the time the review was entered to the time when final judgment was rendered. But the court rendered judgment for the plaintiff for the additional cost only, and interest thereon, and the cost of this suit; to which the plaintiff excepted.

C. French for plaintiff.

The plaintiff insists that he is entitled to interest upon the original debt, from the time of the review to the time final judgment was rendered, as a matter of course, by virtue of the term "intervening damages." The provision of the statute, [Rev. St. p. 160, § 10] is, that the condition of a recognizance for a review shall be to "prosecute the review to effect, and answer and pay all intervening damages occasioned to the adverse party by delay, with additional costs in case judgment be affirmed." "Intervening damages, *ex vi*

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termini, import such as accrue between the appeal, or review, and final judgment." *Way v. Swift*, 12 Vt. 390.

By our practice, if a writ of error does not prevail, or if it be brought for delay merely, our courts add to the first judgment interest at twelve *per cent.*, and double costs. Can there be a doubt but that the interest, in such case, constitutes an item of intervening damages, which, by the spirit and terms of the statute, are to be recovered of the bail? Upon the same principle, I insist, interest on a judgment, pending the review, forms an item of intervening damages, with which the bail must be charged.

When a recognizance by bail is sued, interest is recoverable from the time the bail are fixed. *Child v. Murray*, Coleman's Cas. 59. *Brace v. Squire*, 2 D. Ch. 49. 4 Mass. 103. 6 Mass. 335.

S. Fullam for defendant.

If the plaintiff's judgment was as valuable, when finally rendered, as when the review was entered, no damages were occasioned by the delay; and if he could not have collected the principal, there is no reason why he should collect the interest of the surety.

The opinion of the court was delivered by

HEBARD, J. The judgment, from which the cause was reviewed, was affirmed, and the question is, what damage was occasioned to the plaintiff by the delay. The defendants in the original suit were entirely destitute of property at the time of the review, and have so continued. Of course no part of the debt was lost, nor has any damage in that respect been occasioned by the review.

The plaintiff claims interest on the debt from the time of the review. That is no damage that has been occasioned by the delay. The interest is the same that it would have been without the review. The interest that accrued upon the debt, between the time of the review and the final judgment, has of course been added to the amount for which the final judgment was rendered. It is as well, in that respect, for the plaintiff, as it would have been without the review.

If, at the time of the review, the defendants had been possessed of attachable property, which disappeared before the plaintiff was

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enabled to get his execution, the plaintiff in that case would have sustained intervening damage, which was caused by the delay. But as this fact is negatived, the plaintiff has sustained no damage, except for the additional cost;—and judgment having been rendered for that amount, we find no error in the judgment of the court below.

Judgment affirmed.



ISAAC POLLARD, *qui tam*, v. EDWARD L. WILDER.

The statute, which requires a certificate to be made upon a writ of the "day, month and year when the same was signed," is one affecting the remedy,—and the statute in force at the time the action is commenced must govern.

A certificate of the day, month and year when the writ was *exhibited* to the magistrate signing it, is not a compliance with that section of the Revised Statutes which requires a minute to be made upon such writ of the time when the same was *signed* ;*—and a certificate, defective in this respect, cannot afterwards, and after the action is entered in court, be amended, so as to comply with the statute.

But the motion to dismiss an action for want of the proper certificate upon the writ must be regarded in the nature of a plea in abatement, and, if not made at the time, and agreeably to the rules of court governing dilatory pleas, will be considered as waived.

THIS was an action of debt, brought to recover the penalty given by statute for being party to a fraudulent conveyance. The action was commenced subsequent to the time when the Revised Statutes came in force, but the cause of action accrued prior to their enactment. The magistrate, who signed the writ, indorsed upon it and signed a minute in these words ;—"The within writ was exhibited to me this thirteenth day of May, in the year of our Lord eighteen hundred and forty one." The writ was made returnable at the May Term of Windsor County Court, 1841, and was, at that term, entered in court; an appearance was entered for the defendant, and the case was continued to the November Term, 1841, for trial.

*See *Montpelier v. Andrews*, 16 Vt. 604, and note.

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At the November Term, 1841, the defendant filed a motion to dismiss the suit, for want of a sufficient minute upon the writ of the time when the same was signed by the magistrate issuing it. The plaintiff then moved that the magistrate have liberty to amend his certificate, so as to show that the writ was *signed* by him on the day that it appeared, from the certificate indorsed, to have been *exhibited* to him. But the court overruled the motion to amend, and, *pro forma*, dismissed the action; to which the plaintiff excepted.

P. T. Washburn for plaintiff.

The plaintiff insists,

1, That no minute of the time when the writ was signed by the magistrate was necessary. The action is founded upon the seventh section of the statute of 1821; Slade's St. 266; and the legislature, by the statute of 1808,—Sl. St. 292, have enacted, and this court, in *Forbes et al. v. Davison*, 11 Vt. 660, have expressly decided, that actions for the offence specified in that section are not within the fifth section of the statute of limitations,—Sl. St. 289,—making such minute necessary. It is true the Revised Statutes, which came in force previous to the commencement of this action, in cases similar to it require a minute of the time of signing; [Rev. St. 304, § 5;] but they expressly except all rights *previously accrued*; [Rev. St. 510, § 5;] providing only that the *proceedings*, when *necessary*, should be conformed to their provisions. But the plaintiff insists that such a minute upon the writ is neither part of the *proceedings* in the case, nor *necessary*, nor in any way material to the issue.

2, But that, if the Revised Statutes do govern, the minute which the magistrate put upon the writ was sufficient. If the object of such a minute is to enable the court to decide, by inspection, whether the statute of limitations has run upon the offence charged, that object is well answered by the minute put upon the writ in this case, when the fact certified to in that minute is coupled with the fact that the writ is before the court, actually signed, and service regularly made upon the same day specified in the minute.

3, But that, at all events, the defendant has *waived* his right to have the action dismissed, by entering an appearance at the first

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term, and obtaining a continuance of the cause *for trial*, without interposing his motion. By the statute of 1797 the want of the minute, when necessary, made the process *void*; but by the Revised Statutes this is no longer a fatal defect, but a mere irregularity, to be taken advantage of by the defendant, or to be waived by him, at his option; Sl. St. 289, § 5; Rev. St. 304, § 5;—and coming, as it does, within the general definition of irregularity,—1 Tidd's Pr. 511, 512,—it must be governed by the rules prescribed by the court in similar cases. *Jennison v. Hapgood*, 2 Aik. 31. *Kellogg ex parte*, 6 Vt. 509. *Wilson v. Laws*, Salk. 59. *Hampay v. Kenning*, 18 E. C. L. 318. *Gehegan v. Harper*, 1 H. Bl. 251. *Fox et al v. Money*, 1 B. & P. 250. *Gilbert et al. v. Nantucket Bank*, 5 Mass. 97. *Forbes et al. v. Davison*, 11 Vt. 660. *Wright v. Warren*, 3 M. & Scott, 163, [30 E. C. L. 282.] *Doe v. Johnson et al.*, 3 Doug. 383, [26 E. C. L. 154.] *Caswall v. Martin*, 2 Str. 1072. 2 Saund. 15, n. 2. *Dana v. Barnes*, 6 Taunt. 5, [1 E. C. L. 291.]

4. That the magistrate should have been permitted to amend according to the fact. The signing such a minute is a mere ministerial act on the part of the magistrate, and, as such,—*Per EYRE, J.*, in *Phillips v. Smith*, 1 Str. 136,—is, at common law, amendable at any time, and there is, at common law, no difference, as to the doctrine of amendments, between penal and other actions, when there is any thing to amend by. 1 Tidd's Pr. 710. 1 Str. 136. 2 Str. 1227. *Per* LD. MANSFIELD, in *Bennet q. t. v. Smith*, 1 Burr. 402. *Bondfield q. t. v. Milner*, 2 Burr. 1098. *Wright q. t. v. Horton*, 2 E. C. L. 443. *Manners q. t. v. Postan*, 3 B. & P. 342. The only object of *mesne* process is to bring the party into court; 1 Str. 161; and this object having been attained in this case, and the defendant having procured the cause continued for trial, the court, by permitting the amendment, "would only have made that right, which the defendant himself understood to be so," when he obtained the continuance; *Per* LD. MANSFIELD, in *Sayer v. Pocock*, Cowp. 407.

D. Kellogg, and *C. French* for defendant.

By the Revised Statutes, page 304, sect. 8–10, the justice who

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signs the writ, in cases like the present, "shall enter upon it a true minute of the day, month and year when the same was signed;"—that is, when such action shall be commenced, the minute shall be made, &c.,—at the *time*, and not after. The action is commenced when the writ is signed. *Allen v. Mann*, 1 D. Ch. 94.

From 1797 to 1806 the statute was the same as it is now, except that the expression "shall on motion be dismissed" has been substituted for the expression "shall be void." Under the statute of 1797 the decisions were uniform, holding the prosecutor to a strict compliance with its terms, and holding the writ *void* in case of non-compliance. *Hall v. Brown*, 2 Tyl. 64. *Bowen v. Fuller*, *Ib.* 85. *Denton et al. v. Crook*, *Brayt.* 188. *Hall v. Adams*, 1 Aik. 68. If, then, the writ would have been void under the statute of 1797, we think, most clearly, under the present statute it must, on motion, be dismissed.

The motion to dismiss is not in the nature of a plea, but may be made at any time pending the action. *Treasurer v. Cook*, 6 Vt. 282. 1 D. Ch. 37. *Dassance v. Gates*, 13 Vt. 275. 2 Tyl. 64, 85. *Hubbell v. Gale*, 3 Vt. 266.

The motion for leave to amend cannot, we think, be legal,—since the effect of such an amendment would be, virtually, to repeal the statute.

The opinion of the court was delivered by

HEBARD, J. The statute in force at the time the action is commenced, and not the statute in force at the time of the alleged fraudulent sale, must determine what certificate is to be made upon the writ by the magistrate. The statute, in this respect, goes merely to the *remedy*, and not to the *right*. And upon this point the statute is direct and positive. The Revised Statutes, page 304, sec. 9, provide that, "when any action *shall be* commenced in any of the cases mentioned in this chapter, the clerk, or magistrate, signing the writ, shall enter upon it a true minute of the day, month and year when the same was signed. This provision is evidently made with reference to the time when the action is commenced, and has no reference to the time when the alleged fraudulent sale took place; and a certificate of the day, month and year when the

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writ was *exhibited* is not a compliance with the statute. The statute requires a certain certificate to be made, and we might as well come to the conclusion that none was necessary, as that a different one would answer.

The next inquiry is, whether this certificate, thus defectively made, was subject to be amended. The amendment proposed was not matter of *form*,—it went to the whole substance of the certificate. The statute in criminal proceedings is, that the magistrate shall make a true minute of the day, month and year when the complaint, information, or indictment, was *exhibited*; but in case of a *civil action*, brought to recover a *penalty*, the magistrate is required to enter upon the writ the time when it was *signed*. These requirements in the two cases are different and distinct, and are positive requirements of the law; and a certificate of the time when the writ was *exhibited* is no part compliance with the law which requires a certificate of the time when the writ was *signed*;—and to permit the magistrate, after the writ was entered in court, to alter the certificate in that respect would be in effect to permit him to make a certificate, where none had in fact been made.

The only remaining point to be considered, and the principal one in the case, is, whether the motion of the defendant to have the action dismissed came too late.

The action was entered in the County Court, May Term, 1841, and was there continued to the November Term for trial; and at the November Term the defendant moved the court to dismiss the action for want of a proper certificate upon the writ. The provision of the statute is, that "every bill, complaint, information, indictment, or writ, on which a minute of the day, month and year shall not be made, as provided by the two preceeding sections, shall, on motion, be dismissed;" (Rev. Stat. chap. 67, sec. 10.) The phraseology is very materially changed from the statute of 1797. The phraseology in that statute is that "every bill, complaint, information, indictment, or original writ, on which a minute of the day, month, and year shall not be made, as aforesaid, *shall be void*, [Slade's St. 289, § 5.] The difference between the proceedings being void, and being liable to be dismissed on motion, cannot be disguised; and so palpable a change of the language of the Revised

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Statutes from the old law can hardly be supposed to be accidental. If the writ is void, it of course is subject to the consequences of its imperfections at any stage of the proceedings. If the writ is not necessarily *void*, but possesses some imperfection that must be met by an introductory proceeding, there must be a time in which the notice of the court is to be called to the defect. This *motion to dismiss* must be regarded in the nature of a *plea in abatement*, and be interposed before an *imparlance* in the case, and agreeably to the rules of court regulating such pleas, or it must be in the nature of a *motion in arrest*, and be interposed after verdict. But it does not seem to assimilate itself to the latter, that motion being founded upon some supposed insufficiency of matter, set forth in the declaration, or pleadings, to sustain a judgment.

This *motion to dismiss*, therefore, under the present provision of the statute, as it regards the effect upon the action, must be regarded in the nature of a *plea in abatement*. This certificate upon the writ is a statutory requirement, to be sure, but, like the statute requiring recognizance to be taken upon the issuing a writ, a want of it must be taken advantage of in proper time,—and if not so taken advantage of, it is understood to be waived. The statute provides, that, if a writ shall issue without a proper recognizance being taken, on motion it shall abate; but that motion must be made in conformity with other pleas in abatement,—which is before there has been a *general imparlance*. 1 Tidd's Pr. 462. "When the writ is *de facto a nullity*, so that the judgment thereon would be *erroneous*, then the writ is *de facto abated*;—but when the writ is not *abatable*, it must be abated by pleading in time." 1 Bac. Abr. 10. Judgment reversed, and cause remanded for trial.

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DANIEL S. PUTNAM, CHARLES E. CLEVELAND, DAVID S. AUSTIN,
ELIJAH SPENCER, HARVEY HERRICK AND MOSES MONTAGUE v.
THOMAS P. RUSSELL AND SARAH DOW, Administrators of FRAN-
CIS DOW,

AND

THE SAME v. THE SAME.

[IN CHANCERY.]

Where D. was indebted to A., for which he executed certain promissory notes, and secured them by mortgage upon land, and afterwards executed to him other notes, which were not secured, and, before payment of any of the notes, D. deceased, insolvent, it was held, that, if A., after the execution of the notes, became indebted to D., and no application thereof was made in the lifetime of D., his administrators could not direct the application to be made upon the notes secured by mortgage, but that the law would first make the application upon the notes not secured.

When notes are secured by mortgage on land, and the mortgagor dies before payment, it is not necessary that the notes should be presented to the commissioners upon the mortgagor's estate for allowance, in order to keep the mortgage security good;—but, if they are presented and allowed, the mortgage security is not thereby affected.

There is a material distinction between a *payment*, technically as such, and a *claim* which needs to be filed in offset.

THESE were bills brought to foreclose the equity of redemption of mortgaged premises, and, the material facts in each case being the same, they were heard together upon bills and answers.

The orators alleged, in their bills, that Francis Dow, deceased, of whose estate the defendants were administrators, being in his lifetime indebted to one Samuel Austin, Jr., executed to him three promissory notes, and secured the same by mortgages of the premises described in the bills; and that Austin, after the decease of Dow, transferred the said notes, and assigned the mortgages, to the orators.

The defendants, in their answers, after admitting the execution and transfer of the notes and mortgages, as set forth in the bills, alleged that the estate of the said Dow had been by them repre-

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sented to the probate court to be insolvent, and that commissioners had been duly appointed to examine and adjust all claims against the estate; that, subsequent to the execution of the notes described in the orator's bills, the said Dow had executed to Austin several other notes, not secured in any manner, which notes Austin, after the decease of Dow, assigned and transferred to divers individuals; that, by an agreement between all the different holders of these notes, including the orators, all the notes, including those held by the orators, were presented to the commissioners for allowance, and were by them allowed at the sum of \$745,11; that the defendants, at the same time, presented a certain claim in favor of said Dow against the said Austin, on which the commissioners allowed the sum of \$493,61, leaving a balance in favor of Austin of \$251,51; and that the said estate had proved insolvent, and not sufficient to pay more than fifty cents on the dollar of the claims allowed against it.

The defendants farther alleged that no application whatever of the said claim in favor of Dow against Austin had ever been made upon any of the said notes, until the same were exhibited before the commissioners, and they claimed, as trustees of the heirs and creditors, the right of now, making application of the sum allowed in favor of the estate, or of so much thereof as might be necessary, upon the notes secured by the mortgages specified in the orators' bills. The defendants farther claimed that the orators, by presenting their notes for allowance by the commissioners, had precluded themselves from bringing their bill to foreclose the mortgages.

The court of chancery decreed that payment should be made to the orators of the balance, (\$251,51) allowed in favor of Austin by the commissioners upon all the notes,—being about \$30 less than the amount due upon the face of the mortgage notes, and that, in default thereof, the equity of redemption be foreclosed. From this decree the defendants appealed.

E. Hutchinson for orators.

A judgment at law for the amount of a mortgage note, in a suit brought directly upon the note, *has never been* adjudged, without payment, a bar to a bill subsequently brought to obtain a decree of foreclosure of the mortgage. The allowance by the commissioners,

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can have no other effect, than any judgment at law, establishing the validity of the notes. Had the commissioners decided *against* their validity, and disallowed the mortgage notes, and so reported to the Probate Court, without an appeal from that decision, the case *might* have presented a different aspect. But the allowance by the commissioners, although unnecessary for the purpose of *setting up* the mortgages, so far as it operates at all, *establishes* the mortgage notes, and it is difficult to see why it should at all *impair* the mortgage securities.

After the representation of insolvency and appointment of commissioners, by force of our statute no recovery could be had upon any of the notes, not secured by mortgage, in the name or for the benefit of any one, except by laying them before the commissioners. If not so presented, they are barred. If held by the original payee *at the time of the maker's decease*, they must be presented and allowed, (as was done in this instance,) in the payee's name, and the balance must be struck, and in the same names, as it stood between payee and maker on the day of the decease; no matter how many subsequent transfers may have been made of the notes, and without regard to the question of to whom that balance belongs, should any be found against the estate. *Jarvis v. Barker's Adm'r*, 3 Vt. 445. *Leavenworth v. Lapham*, 5 Vt. 204.

It was so done in this instance. The mortgage notes, as well as the others, were, by the common consent of their respective holders, all presented and allowed in the name of Austin;—all claims in favor of Dow against Austin were off-set;—and the commissioners struck and reported the exact balance, which was due from Dow to Austin on the day of Dow's decease. That the mortgaged premises would remain holden for the payment of that balance to Austin, had he still remained the owner of all the notes and the mortgages, (it being less than the amount due upon the out-standing mortgage notes,) no one could deny. When, therefore, the defendant's administrators had seen those claims thus adjusted by the commissioners, in the form required by law, they had no farther duty resting upon them in the matter save one,—which was, to pay up the balance reported by the commissioners and procure the mortgages to be discharged of record. Rev. St. p. 289, ch. 51, § 4.

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The mortgage deeds, in express terms, grant and confirm the lands in question to Austin and "*his assigns*," (not during the life of Dow only, but, "*forever*," as security for the payment, (not of other notes between the same parties, but) of the identical notes described in the conditions of the mortgages. By the contract of the parties, in express terms, nothing but a full extinguishment of the debts, evidenced by the mortgage notes, could divest the title to the mortgaged premises out of Austin, or his assigns, who should become such in all after time, whether before, or after, the decease of Dow. The presenting the mortgage notes before the commissioners was not a matter of necessity to the orators, but was adopted by them, as being a convenient and cheap mode of ascertaining the sum due in equity, in preference to bringing bills to foreclose in the first instance, and submitting to the expense and delay of ascertaining the deduction to be made from the notes, (if any,) in the usual way of contested suits in chancery.

The pretended right insisted upon in the answer by the administrators, "*as trustees of the heirs and creditors*," now to elect to apply the claims allowed by the commissioners in favor of the estate, first to the extinguishment of the mortgage notes,—thereby releasing the mortgaged premises entirely, without payment of a mill, to any one, of the balance found due from Dow at the time of his death,—an election, which it will not be pretended that Dow, if now living, could make,—nor his administrators, were Austin now the holder of all the notes and mortgages,—is too preposterous to require refutation. Besides, the answer clearly shows those sums to be mere matters of *off-set*, not payments. Dow, in his deeds, covenants, for himself and his administrators, to *make good* the mortgage security to Austin and his assigns. He being dead, his administrators now claim the right, without payment, to *repudiate* the covenant of their intestate.

O. P. Chandler for defendants.

This is an ordinary bill for foreclosure on two notes, given by Dow to Samuel Austin, Jr., and, *since* the decease of Dow, assigned to the orators.

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1. These claims stand upon the same footing as the other demands. The assignee of a mortgage takes it subject to all equitable offsets. *Niagara Bank v. Roosevelt*, 9 Cow. 409.

2. This is not an attempt to invalidate the mortgage, but to ascertain the sum due in equity on the notes, and should be treated like an interpleader, as the administrators act for all the creditors.

3. We insist, that, as no application of the offset was made by either party, the law will make the application upon the debt most burthensome to the debtor,—to wit, the mortgages. *Heywood v. Lomax*, 1 Vern. 24. *Pattison v. Hull*, 9 Cow. 765. *Emery v. Tichout*, 13 Vt. 19. *Robinson v. Doolittle*, 12 Vt. 249.

If that rule be not adopted, then we say that no rule can be adopted more favorable to the orator, than to make the application according to equity,—considering all the parties to be affected by it; and as, by the answer, it is shown that the estate pays only fifty *per cent.*, the orator's claim secured should be reduced twice as much as the others. *Seymour v. Van Slyck*, 8 Wend. 405. *Cramer v. Robinson*, 1 Mason 323. A *pro rata* application would be more than justice to the orator, for the reason that he obtains by his security on the land the whole amount, which would reduce the dividend to the amount allowed the other creditors.

The opinion of the court was delivered by

HEARD, J. These are bills brought to foreclose the equity of redemption in certain mortgaged premises. The notes secured, and the mortgage deeds, were executed by one Francis Dow, now deceased, to one Samuel Austin, Jr., and the notes and deeds were duly assigned by said Austin to the orators, after the decease of said Dow. The estate of Dow was represented insolvent by the administrators upon their appointment, and upon the settlement it turns out to be so in fact. There were other notes executed by Dow to Austin, not secured, and which were, by Austin, assigned to other individuals, to whom Austin was indebted.

These orators, together with the assignees of the notes not secured, agreed to present the notes, by them all respectively held, to the commissioners, for allowance against said estate, in the name

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of said Austin;—and they were so presented, and were allowed by the commissioners at the sum of \$745,11, in the whole;—and at the same time the defendants, as administrators, presented a claim in offset, which was allowed, by the commissioners, in favor of the estate, and against Austin, to the amount of \$493,61,—leaving a balance against the estate of \$251,51, which was a sum less, by about \$30, than was due upon the notes held by the orators, and secured in the mortgage deeds;—and this sum the orators ask to have the defendants decreed to pay to them, within some equitable time, or, in default, that the equity of redemption in the mortgaged premises be foreclosed.

The defendants insist that the claim that was presented by them, and allowed in offset, should be treated like a payment, and that, in making the application of that payment, they have a right to elect upon what indebtedness it shall apply. The first difficulty to be overcome, in acceding to that doctrine, will be to liken this *claim*, that was allowed, to a *payment*. The administrators presented a *certain claim* in favor of Dow against Austin; but what constituted that claim does not appear. Whether it consisted of mutual dealings between the parties, upon running accounts, or whether it was a claim upon some separate and independent contract, or for damages for the non-performance of some contract, or of some other name, or kind, does not appear. But whether it was for some one of these, or for some other that might be named, is not very material, there is a marked distinction between a payment, *technically as such*, and a claim that may be enforced to recover a sum in damages. From anything that appears we are to understand this *claim* to be of the latter kind; and the most the defendants could insist upon would be to have this *claim*, held by Dow against Austin, balance an equal amount of the claims held in Austin's name.

The orators were under no necessity of presenting their notes to the commissioners for allowance; they might have relied upon their mortgage security as well without it; and if they had done so, and left the assignees of the notes, not secured, to have presented their notes for allowance, without the orators presenting theirs, the result would have been a balance of \$30, in favor of the estate;—and in

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that case, when the orators should bring their bills as they now have, for a foreclosure, the most, that the defendants could insist upon, would be, the deduction of this \$30 from the amount due upon the notes secured by the mortgage, which would leave the same sum due in equity that the orators now claim. The orators, it is to be presumed, acted upon some such understanding of the law, when they presented their notes for allowance.

What has already been said in relation to this claim against Austin, which was allowed by the commissioners, being a payment will dispose of the whole question. If it was not to be regarded as a *payment*, then nothing need be said about its application. The doctrine, I believe, is as well established, as any other, that, where a debtor makes a payment, he may, if he choose, direct its application. And if he do not direct, the creditor may elect as to the application. And in the case of *Briggs v. Williams*, 2 Vt. 283, the court held, that, if a payment has been made, and neither party has elected as to the application, the court will direct the application to those debts which have the poorest security.

As Dow mortgaged the premises to secure these notes, and did not secure the others, it is to be presumed, as matter of law, that he intended to make a distinction between the two classes of notes, and that the premises should remain as security, till the debt was extinguished by *payments* in fact made, and the application directed to these notes, or until a full settlement and adjustment of the dealings between him and Austin would liquidate and swallow up those notes; and I think the authority cited,—*Niagara Bank v. Rosevelt*, 9 Cowen 400,—goes no farther than that.

The decree of the Chancellor is affirmed, with additional costs.

Allen, Adm'r. v. Mower.

CAREY ALLEN, administrator of SYLVESTER EDSON, v. LYMAN
MOWER.

[IN CHANCERY,]

An answer, responsive to the bill, and not asserting a right *affirmatively*, in opposition to the right claimed in the bill and independent of it, is proof of the facts stated in the answer.

But, if the answer assert matter *affirmatively*, though it be responsive to the bill, *quære*, whether, upon a traverse, the answer shall be received as proof, or as mere pleading requiring to be proved. BENNETT, J.

Though the intestate, in his lifetime, may have combined with the defendant to receive a transfer of certain *choses in action* belonging to the intestate, to avoid the trustee process and the rights of the intestate's creditors, yet, if he received from the defendant a full consideration therefor, a court of chancery will not decree that the defendant pay to the administrator the value thereof a second time, for the benefit of creditors, though the estate may be greatly insolvent.

The statute,—Rev. St. 275, § 39,—giving an action to the executor, or administrator, where there has been a fraudulent conveyance, to the injury of creditors, should extend only to cases where the fraud would, without such action, prove prejudicial to the assets of the estate.

IN THIS CASE the orator alleged in his bill that he had been duly appointed administrator upon the estate of Sylvester Edson, deceased, who died May 29, 1839, and that, at the time of his decease, and for some years previous thereto, the said Edson was greatly indebted, and to an amount much beyond his ability to pay; that all his visible property had been attached by his creditors, but that he still retained, and kept concealed, much personal property, which he should have devoted to the payment of his debts; that, for the purpose of such concealment, he was accustomed to take notes, for money which he lent, or for property sold, payable to some friend, or bearer; and that, especially, just previous to the first day of January, 1839, when the statute extending the remedy by trustee process was to come in force, he was very active in placing his money and other personal property in the hands of persons who

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were willing to befriend him in keeping his property out of the reach of his creditors; and that all this was well known to the defendant.

The orator farther alleged, that, on the 26th day of March, 1838, one Thomas McLaughlin, being indebted to said Edson in the sum of \$1300, at the instance of Edson signed a note for said indebtedness payable to the defendant, or bearer, on demand, with interest, and also, at the same time, executed a mortgage to the defendant of certain premises to secure the payment of said note, and delivered the said note and mortgage to Edson; that the defendant had no interest whatever in the said note and mortgage, and that Edson's intent in taking the note and mortgage to the defendant was to place the debt out of the reach of his creditors; and that the defendant, well knowing the said intent of Edson, received the said note and mortgage, and had obtained a decree of foreclosure of the equity of redemption of the mortgaged premises.

The orator farther alleged, that, in the spring of 1838, Edson was the owner of three promissory notes, all executed by Edmund S. Hayden, two of said notes, one for \$700, and the other for \$500, being made payable to John Lake, or bearer, and the other of said notes, being for \$600, payable to John N. White, or bearer; that neither the said Lake nor the said White had ever any interest in said notes, but the same were taken payable to them with the intent, on the part of Edson, to thereby secrete the same from his creditors; that, on the 31st day of March, 1838, the defendant, having no interest whatever in said notes, but with a readiness and intent to aid Edson in the collection of the money due upon the notes without making known to his creditors his interest therein, commenced an action in his own name, as bearer of the said notes, against the said Hayden, and subsequently recovered judgment against him for \$2225 damages; that the defendant had no interest in said judgment, but prosecuted the said action to effect solely for the benefit of Edson; and that afterwards, on the 31st day of December, 1838, being the day previous to the coming in force of the statute relative to the trustee process, above referred to, the defendant, with intent to aid Edson in more effectually placing the amount due upon said judgment out of the reach of Edson's creditors, pre-

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tended to purchase said judgment of said Edson, and afterwards collected a large part thereof, and converted the same to his own use.

The orator farther alleged that Edson, on the 28th day of December, 1838, held notes against one Bullard, which were secured by mortgage, and which Bullard had no means of paying, except by releasing to Edson his equity of redemption in the mortgaged premises; that Edson, with the fraudulent intent, as above set forth, procured Bullard to execute a quitclaim deed of the said premises to the defendant; and that the defendant, with like intent, received the said deed, pretending to purchase the said premises of Edson, and caused said deed to be recorded, and Edson then discharged his mortgage.

And the orator alleged that there were debts outstanding against the estate of Edson to the amount of nearly \$50,000, and that the estate was insolvent to a large extent, and that, by the transactions above set forth, the debts and property above specified had been kept entirely out of the reach of the creditors.

The defendant, in his answer, admitted the truth of the orator's allegations as to the indebtedness of Edson, his decease, and the insolvency of his estate; he also admitted that he received of Edson the note and mortgage executed by McLaughlin, mentioned in the orator's bill,—but alleged that he received them in pursuance of a written agreement, entered into by him in March, 1838, at the request of Edson, and to enable him, as he said, to pay some of his creditors, who had offered to make him a discount upon their demands, by which agreement the defendant was to pay Edson \$1000, in four and six months, and have a *bonus* of six *per cent.* for raising the money, and have the said note and mortgage as security; and he alleged that he paid to Edson the said sum of \$1000,—deducting the *bonus*,—and that afterwards, and before the first day of January, 1839, Edson solicited him to purchase the balance due on said note, and that he did so, and paid to Edson therefor the sum of \$300 in money,—the said Edson allowing him the interest which had accrued.

The defendant farther alleged, that, in the summer of 1837, Edson, being indebted to him in about the sum of \$1130, for money

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advanced by the defendant for him at different times, placed in the defendant's hands, as collateral security therefor, the two notes signed by Edmund S. Hayden, and payable to John Lake, mentioned in the orator's bill; that, in March, 1838, Hayden being in failing circumstances, the defendant consulted with Edson in reference to the expediency of commencing an action upon said notes, to which course Edson advised, and then told the defendant that he held another note against said Hayden,—being the note specified in the orator's bill as payable to John N. White,—and requested the defendant to include that note in the same writ with the two notes held by the defendant, in order to save costs; that the defendant commenced an action upon said three notes, and recovered judgment thereon, as alleged by the orator; that afterwards, in November, or December, 1838, the defendant applied to Edson for payment of the sum for which the notes against Hayden were pledged to him, and requested him to take the control of the said judgment,—no part of it having then been collected,—and that Edson then wished to raise funds to pay a debt on which he had been committed to jail, and also some other debts, and solicited the defendant to purchase his interest in the judgment against Hayden, and also to purchase a claim which he held against one Bullard for about \$1500, which was secured by mortgage,—being the same claim mentioned in the orator's bill; that afterwards, on the 31st day of December, 1838, the defendant purchased of Edson the said judgment against Hayden,—Edson making a discount of twenty *per cent.* on the amount due thereon,—and gave up to Edson his claim against him for the money advanced, amounting then to \$1213,50, and paid the balance to Edson in money, being \$563,50; and that, on the 28th day of December, 1838, he purchased of Edson his claim upon the premises occupied by Bullard, and paid him therefor the sum of \$1500 in money,—Edson procuring Bullard to execute a quitclaim deed of the premises to the defendant.

And the defendant denied all knowledge of any intent in Edson, by these transactions, to defraud his creditors, or put his property out of their reach, and all participation on his part in any such intent, but claimed that his only object in each transaction was to make a fair and honest trade.

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Testimony was taken upon both sides; the testimony on the part of the orator tended to show a general intent on the part of Edson to put his property out of the reach of his creditors. Some portion of the payments, which the defendant claimed that he had made to Edson, were proved,—but of others there was no proof except the answer.

The court of chancery dismissed the bill, with costs, from which decree the orator appealed.

T. Hutchinson and C. Marsh for orator.

1. The defendant is chargeable with constructive notice of Edson's fraudulent intent. The circumstances were abundantly sufficient to apprise him of this intent and put him on his guard. A knowledge of facts, from which a particular *inference* must necessarily follow, is, in law, knowledge of such inference.

2. The defendant, in his answer, *averts* that in the fall of 1837 Edson owed him \$1130 for money which he had before advanced for him,—that is, paid to other persons for his benefit. This averment may be regarded as a plea in bar to that part of the bill which claims relief on account of these notes having been placed in the defendant's hands without consideration, or with a fraudulent intent. It is an averment *dehors* the bill, and, as such, is to be supported by testimony. The answer, though sworn to, has no tendency to prove the fact. The defendant is only a witness, in chancery, in denying the charges in the bill. When he avers an *independent fact*, by way of defence, he is as much bound to sustain such fact, when traversed, as the plaintiff is to prove the facts charged in the bill, when denied in the answer.

Now there is not a *scintilla* of evidence to sustain this averment in the answer. Whatever property the defendant has received of Edson on account of this pretended advance for Edson, that sum he clearly holds without having paid any consideration, and in trust for Edson's representative. *Hart v. Ten Eyck et al.*, 2 Johns. Ch. R. 62.

3. The purchase of the Bullard claim is the most remarkable transaction in the whole. This was done at the last moment before the trustee act took effect. There was no chaffering about the

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price, or time of payment. In the other cases there was a *bonus*, or some *deduction*, but none here. The money was carefully counted over, and the deed executed, in the presence of witnesses. But *whose* was the money thus paid over?

4. The testimony taken in the case shows, we think, conclusively, that the defendant was perfectly acquainted with the motives of Edson, and that he intentionally co-operated with and aided him in effecting the object.

Chandler and Tracy & Converse for defendant.

To entitle the orator to a decree in his favor he must show that the defendant received the property of Edson without paying any consideration therefor, and solely in trust for Edson. Such is the complaint, and upon that his right to recover is predicated. The answer admits that the defendant received some property of Edson, but insists that it was received upon a fair and *bona fide* purchase, and that an *adequate consideration* was paid therefor.

Whatever may have been the knowledge of the defendant of the intention of Edson to evade the trustee law, or the attachment of his property by his creditors, this court will not vacate the contracts between him and Edson, nor compel the defendant to account for any property received by him of Edson, on any other condition than that he should be indemnified for what Edson owed him, and for what he actually paid towards the property. This court will not compel him to pay for the property twice, as that would be manifestly inequitable. But how can it be contended that the defendant had any such knowledge? It is positively denied in the answer; no express knowledge is proved; and, instead of its being proved that there was any *general understanding*, or *rumor*, of the kind, the reverse is proved.

Again, we insist that the plaintiff could not sustain this suit, though all the allegations in the bill were proved. He could not, at the time of commencing this suit, have sustained any suit which his intestate could not; and it is very manifest that the intestate could not have questioned the legality of the transactions between himself and the defendant.

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The opinion of the court was delivered by

BENNETT, J. A question has been raised, in argument, how far the answer of the defendant is to be regarded as evidence. The rule usually laid down is, that the defendant, is bound to answer every part of the substance of the statement and charges in the bill, and that every particular interrogatory, founded upon an express allegation in the body of the bill, must be answered precisely, in all its bearings and circumstances. Labe's Eq. Pl. 267. *Hepburn v. Durand*, 1 Brown 503. *Mountford v. Taylor*, 6 Ves. 791. *Woods v. Menell*, 1 Johns. Ch. R. 103:

The case of *Smith v. Clark*, 4 Paige, is full to the point that the charging part of the bill is not to be treated as mere surplusage, but that it must be answered. If the answer sets up *affirmative* matter by way of avoidance, and is not responsive to the bill, upon a traverse of the answer all the authorities agree that the answer is not proof of such matter.

But if, however, the *affirmative* matter in the answer is responsive to the bill, it cannot be disguised that there is considerable discrepancy in the authorities, whether, upon a traverse, the answer shall be received as proof, or as more pleading, to be sustained by ordinary proof, like a special plea. To hold, in cases, in which the answer asserts a right *affirmatively*, in opposition to the right claimed by the orator, that the answer is to be received as proof of such matter is in effect to make the defendant a witness for himself, and not simply for the orator. It is readily perceived that every thing in the answer, responsive to the bill, as to the creation of the original liability charged, must be taken together, as part and parcel of one entire transaction. But if the original liability is once admitted by the answer, it may, at least, be questioned, upon principle, whether the defendant can escape from it, except by proof *aliunde* the answer; and though the matter set up in defence is *responsive* to the bill, yet if it is distinct, and wholly independent of the original liability charged, it may be inquired why the defendant should not support it by proof, as well as the orator his claims. Though the plaintiff makes the defendant a witness for himself, yet should this, in any case, give the defendant the right to be his own witness, as to any matter in defence disconnected with, and independent of, the *original* liability? So far as the present case is concerned, it is

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not necessary to review the conflicting authorities upon this point; much less to express any opinion. The bill now before us calls directly upon the defendant to answer whether he had any interest in the securities by him taken, or whether he received them *without consideration*, and in trust for Edson, with the *intent* and for the purpose charged in the bill. To answer fully, necessarily involved the statement of all the circumstances, the conditions and consideration upon which they were received; and the whole is but a single transaction; and the answer is clearly competent evidence. It fully denies all knowledge in the defendant of any fraudulent intention in Edson in making a disposition of these demands, and affirms that he purchased them in good faith, and for a valuable consideration.

Though we might be all satisfied that the evidence was sufficient to show fraud in Edson, yet, for one, I should hesitate in finding the evidence sufficient to countervail the answer, so as to connect the defendant with the fraudulent intention in Edson. It is, however, unnecessary to pass upon that point. In the case now before us a full consideration was paid to Edson, by means of which his estate was benefited to that amount; and it is the same thing as if it had been paid to his administrator. It is not to be presumed that the intestate has wasted his estate, but rather that the consideration paid has gone to increase his assets. If we were to decree against the defendant, it would, in effect, give the estate the benefit of receiving a second time the full value of this property, and inflict a penalty upon the defendant. This would be inequitable, and is a sufficient reason why chancery will not lend its aid to the administrator. Equity has already been done.

The Statute,—Rev. St. p. 275, § 39,—giving to the executor, or administrator, in case of deficiency of assets, a right to prosecute to final judgment for the benefit of creditors, where there has been a fraudulent conveyance to the injury of creditors, should not be extended to a case like this, but only to cases where the fraud will be otherwise prejudicial to the assets of the estate.

The result is, we advise an affirmance of the chancellor's decree, dismissing the bill, with additional costs in this court. The case is remitted to the court of chancery, to be proceeded with accordingly.

Allen, Adm'r, v. White.

CAREY ALLEN, administrator of SYLVESTER EDSON, v. JOHN N. WHITE.

[IN CHANCERY.]

Where the orator, an administrator, alleged in his bill that the intestate, in his lifetime, had delivered certain promissory notes to the defendant with the fraudulent intent of placing them out of the reach of the intestate's creditors, and that the defendant, participating in such intent, had received the notes, and still retained them, or the avails of them, wrongfully, and the fact appeared to be, that the defendant, for all notes so received by him, had paid a full consideration, so that he was not now liable for their amount, yet, it appearing that the defendant had received certain other notes of the intestate, in his lifetime, for collection, and had collected the amount due upon them, he was ordered to pay to the administrator the amount so collected, with interest and costs.

IN THIS CASE the facts alleged in the bill in reference to the indebtedness and the fraudulent intent and practices of the orator's intestate, Sylvester Edson, and the insolvency of his estate, were substantially the same as detailed in the preceding case,—*Allen, Adm'r, v. Mower, ante*, p. 61,—and the orator alleged that this defendant had, with like intent, just previous to the first day of January, 1839, received from the intestate divers promissory notes, to a large amount, in which the defendant had no interest, and for which he had paid no consideration, and the avails of which he had received and refused to pay to the orator.

The defendant, in his answer, admitted that he received of Edson, on the 31st day of December, 1838, several promissory notes, the property of Edson, amounting in the whole to nearly the sum of \$3000, most of which were negotiable, and not then due, and transferred to him by indorsement, and alleged that, in exchange for them, and in pursuance of an agreement then entered into between himself and Edson, he then delivered to Edson other promissory notes, which were the property of the defendant, amounting to nearly as large a sum, and signed by persons perfectly responsible

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for their amount,—while he claimed that the notes which he received of Edson were, in some instances, of doubtful security ; and he alleged that this exchange was made in perfect good faith, and without any trust, or reservation, whatever, and that there was no intent on his part thereby to defraud the creditors of Edson, nor any knowledge that the object of Edson was to place the said notes out of the reach of the trustee process.

But the defendant admitted that afterwards he received of Edson, for collection, two of the notes, which, by the exchange aforesaid, had become the property of Edson,—one of said notes against E. A. & S. J. Russell, for the sum of \$155, and the other against Ammi White for about \$120,—and that he had collected the amount due upon the Russell note, and also \$35 upon the note against Ammi White,—which sums were still in his hands,—and that the note against Ammi White had now become worthless on account of the insolvency of said Ammi.

Testimony was taken by the orator tending to prove, among other things, the knowledge of the defendant that the object of Edson, in effecting the transfer of his notes, as detailed in the answer, was to place the same out of the reach of his creditors.

The court of chancery decreed that the defendant pay to the administrator the sum received by him upon the note against the Russells, amounting in the whole, with the interest, to \$187.50, and costs, and that he be acquitted from all the other charges contained in the bill. From this decree the orator appealed.

T. Hutchinson and C. Marsh for orator.

It appears, in this case, that the defendant has knowingly and effectually aided the intestate, in his lifetime, in placing and keeping his property out of the reach of his creditors ; and, having got the same into his own possession, though he may have paid a valuable consideration therefor, it is perfectly equitable that he should account for it to the administrator, for the benefit of the creditors. Whatever is done fraudulently is not, to any legal intent, done at all, so far as to embarrass creditors intended to have been defrauded by the transaction.

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O. P. Chandler for defendant.

1. The substantial facts set forth in the answer being responsive to the bill, they are to be taken as true, if uncontradicted by the evidence. The only fact attempted to be established in opposition to the answer is the alleged knowledge of the defendant of the intent of Edson; and the evidence upon this point is too vague and unsatisfactory to be relied upon.

2. As the notes received by the defendant were negotiable and current when he received them, the exchange could not have the effect alleged to have been intended; therefore it is not to be presumed that they had such intent.

3. As, in the exchange, a fair equivalent was given, the creditors are not injured.

4. The money received on the Russell note and the Ammi White note was received by the defendant, as agent, on notes placed in his hands for collection. This might be recovered at law, after demand,—which was not made,—and should not be recovered in this suit.

5. The defendant should recover his costs, as no concealment is shown in respect to this money, and no demand was made before suit.

The opinion of the court was delivered by

BENNETT, J. This bill is founded upon a state of facts similar to those set forth in the case in favor of the same plaintiff against Lyman Mower, decided at the present term of this court, and is dependent upon the same principles.

The answer is full that the notes, received of Edson by the defendant, were received in exchange for other notes, and that the exchange was absolute, without condition, and without any trust resulting in any way for the benefit of Edson; and that the estate has had the full benefit of the notes given in exchange. The general principles, then, governing the case of Mower, must govern this, and there is no occasion to reiterate them.

It is, however, admitted, that, subsequent to the exchange, the defendant, for special reasons detailed in his answer, received from Edson two of the notes, which he had let him have,—viz. one

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against Russell, bearing date the 21st of May, 1838, for \$155, and the other the note against Ammi White. The defendant says that he received these notes to collect for Edson, and that he has received the amount due on the Russell note, and \$35 on the Ammi White note, but that White is poor and unable to pay the residue of it.

These moneys are now in the hands of the defendant, and are held in trust for the benefit of the estate. The Chancellor decreed that the defendant refund only the amount, and interest, received upon the Russell note. Probably the amount received upon the White note was passed over through some inadvertence. Both sums evidently stand upon the same principle.

This Court, then, advise an alteration in the decree of the Chancellor in this, viz. by adding to the sum decreed to be paid by the Chancellor, the sum of thirty five dollars, received upon the White note and the interest on it since received, to be computed to the time of making the final decree, and that the defendant also be decreed to surrender up the Ammi White note to the orator by a short day, to be fixed by the Chancellor, for the use and benefit of the estate; and that the defendant pay the costs of this court; and the cause is remitted to the Chancellor to be proceeded with accordingly.

CASES
ARGUED AND DETERMINED
 IN THE
SUPREME COURT
 OF THE
STATE OF VERMONT,
 FOR THE
 COUNTY OF ESSEX.
 MARCH TERM, 1848.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
 HON. STEPHEN ROYCE, } ASSISTANT JUDGES.
 HON. WILLIAM HERARD, }

JOHN S. NELSON v. DAVID E. DERRISON.

If a writ, returnable before a justice of the peace, is put into the hands of an officer for service more than sixty days before the return day therein named, it is his duty, under the statute, to omit making any service thereof until within sixty days before the return day.

If the officer, in such case, attach property upon the writ more than sixty days before the return day, he is not justified by the writ, and acquires no title to the property, as against an officer who subsequently takes the same

* *For the cases decided in Essex, Orleans and Lamoille counties, in 1843, I am indebted to the courtesy of Hon. Wm. Slade, the Reporter of Vol. 15 of the Vermont Reports, by whom they were furnished to me, and by whom the greater part of the labor of preparing them for publication was performed. With the exception of the marginal notes, a few notes which have been appended to the cases, and some few changes in the text, made for the sake of brevity, the cases are published as they were prepared by Mr. Slade.

P. T. W.

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property from his possession by virtue of a regular execution ;—and it makes no difference that the debtor neglects to appear at the time set for trial in the first writ and object to the irregularity of the service.

Where a statute prohibits any thing to be done, an act done in contravention of the prohibition must be adjudged void and inoperative, if the statute cannot otherwise be made effectual to accomplish the object intended by its enactment.

TRESPASS, brought to recover for a quantity of wheat and oats in the straw. Plea, the general issue, with notice of special matter, and trial by the court.

It appeared that the plaintiff, as deputy sheriff, attached the property in dispute as the property of one James Long, on two writs against him, one in favor of Allen Gould, dated September 3, 1840, and the other in favor of Seth Cushman, dated September 2, 1840, and both returnable before one Cummings, a justice of the peace, on the 28th day of November, 1840. The attachment was made by the plaintiff on the 4th day of September, 1840.

The defendant justified, as having taken the property as constable of Guildhall, on the 5th day of September, 1840, on an execution in favor of Wilson & Richardson against said Long, which issued on a judgment recovered before John Dodge, justice of the peace, on the 9th day of May, 1840, for \$72.96 damages, and \$2.87 cost, which execution was issued the same day the judgment was rendered, and was made returnable in 120 days. The property was removed by the defendant when he attached it, and was duly advertised and sold on the execution.

The county court rendered judgment for the plaintiff. Exceptions by defendant.

Bell & Heywood for defendant.

1. The service of the writs, under which the plaintiff claims his right to sustain this action, was void. The statute says, that "A 'justice writ of summons, or attachment, shall be served not less 'than six, nor more than sixty days before the time therein appointed for trial." Rev. St. 171, sec. 12.

The writs were dated September 3, 1840, and were made return-

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able November 28, 1840, and were served by the plaintiff, September 4, 1840,—eighty-five days before the day set for trial.

It will be contended for the plaintiff that the defect could be taken advantage of by the defendant, only, in those suits; and that, if he omitted to plead in abatement, he waived the irregularity. But this, being an act done contrary to law, could not be waived.

The subsequent attaching creditors have an interest to have the property promptly sold, that they may receive the balance, and the debtor could not waive their rights.

S. Cushman for plaintiff.

The grain was attached by the plaintiff on the fourth day of September, he having, in all things, complied with the requisitions of the laws of this state. By the attachment the plaintiff acquired such an interest in the property, as would enable him to maintain an action of trespass against any person, who should subsequently take it away. Rev. St. 181, sec. 21. *Bliss v. Stevens*, 4 Vt. 88. *Stanton v. Hodges*, 6 Vt. 64.

But it is contended by the defendant that the plaintiff acquired no right to, lien on, or interest in, the property, for the reason, that the return day in the writ was more than sixty days after the day of service. This defect could have been taken advantage of by no one but the debtor. The writs are not void in consequence of it; but merely voidable. The statute is directory; but the parties may agree that the writ may be returnable in five days, or fifty days, after date and service, although the statute has secured to the defendant six days, in which to prepare for trial on the one hand, and, on the other, has provided that the defendant's property, or body, shall not remain in the custody of the law more than sixty days, before he may have an opportunity for trial.

Unless this defect in the proceedings rendered the officer a trespasser, the plaintiff had a legal lien on this property,—a special, qualified interest. Subsequent attaching creditors, or purchasers, cannot be permitted to take advantage of any defect in the return of an officer on a writ, on which the property was first attached. *Harris v. Langdon*, 5 Vt. 231.

The plaintiff's right to the property could not have been ques-

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tioned, even had he made the writ. *Bewell v. Harrington*, 11 Vt. 141. *Eastman v. Curtis*, 4 Vt. 616. A writ, returnable to the next term of the court but one, may be amended, and the writ is not void therefor. *Cayward v. Doolittle et al.*, 6 Cow. 692; 1 N. Y. Dig. 50. A *capias ad satisfaciendum*, or *respondendum*, may be amended, when it is returnable at a wrong term. *McKonkey v. Glen*, 1 Cow. 141; 1 N. Y. Dig. 50. When a term intervenes between the *teste* and return of a writ of inquiry, it may be amended. It is cured by the statute of jeofails. *Adm'r of Desmond v. Carpenter*, 8 Johns. 183; 1 N. Y. Dig. 55. A *ca. sa.*, tested out of term, is not void, but voidable only, and may be amended on motion. 1 N. Y. Dig. 59; *Jones v. Cook*, 1 Cow. 309. An execution, returnable out of term, is not void, but amendable. *Cramer v. Van Alstyne*, 9 Johns 386. So an execution, issuing for too large a judgment, is not void. A *certiorari* may be amended, though a term intervene between its *teste* and return. *Bissell v. Kip*, 8 Johns. 89; *Jackson v. Crane*, 1 Cow. 38; N. Y. Dig. 61.

The opinion of the court was delivered by

WILLIAMS, Ch. J. This was an action of trespass, brought by the plaintiff to recover of the defendant for a quantity of wheat and oats in the straw, taken by the defendant. It appears that the plaintiff, who was specially deputed and authorized, on the 4th day of September, 1840, took the property in question, which belonged to one Long, by virtue of two writs of attachment, returnable before a justice of the peace, one in favor of Allen Gould, and the other in favor of Seth Cushman, against said Long, returnable the 28th day of the following November, and more than sixty days from the date of the service. The defendant, a constable of Guildhall, by virtue of an execution in full life, against Long, and in favor of Wilson & Richardson, on the fifth day of the same September levied on the same property, and advertised and sold the same on the latter execution. The plaintiff served the two writs of attachment by leaving copies with the town clerk, agreeably to the directions of the statute, which is equivalent to actual possession of the property attached. As the regularity of the proceedings of the defendant and his appointment as constable have not been objected to, the only

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question is, whether the plaintiff, by the attachments, and service thereof, has acquired a right to the property attached against the creditors of Long, as the service was made more than sixty days before the time appointed for trial.

The statute,—Rev. St. c. 26, § 12,—declares that a justice writ shall be served not less than six, nor more than sixty days before the time therein appointed for trial. It is the duty of the officer, having such writ to serve, to obey the directions of the statute, as well as the command of the writ. Although a longer period than sixty days may intervene between the date and the return day of the writ, the statute requires of the officer to omit any service more than sixty, or less than six days before the time appointed for trial; and, if he disobeys the command of the statute, he is not justified by his writ, and cannot acquire any rights thereby.

It has been contended in this case, that the statute is only directory to the officer, and that no one can avail himself of its provisions except the debtor, and that, as the debtor did not appear in the two cases and object to the service, but suffered judgment to be rendered by default, his creditors, or the defendant, who had an execution against him, cannot raise this objection. Both of these positions are untenable. The statute is not to be considered as directory, contrary to its express negative terms, as was observed in the case of *Warner v. Stockwell et al.*, 9 Vt. 1. Every statute, which commands any thing to be done, or abstained from, is directory, as well as prohibitory; but it cannot be consistent with propriety to say, that any one may therefore disregard its requirements, and acquire any rights by virtue of an act done, or omitted, contrary thereto. Furthermore, where a statute prohibits any thing to be done, the act done in contravention of the prohibition must be adjudged void and inoperative, if the statute cannot otherwise be made effectual to accomplish the object intended by its enactment. It will readily be seen that this statute, as well as the one which declares that the time set in a justice writ for trial shall not be earlier than nine o'clock in the forenoon, nor later than three in the afternoon, would be ineffectual, if the party must be held to bail, and appear at the time set for trial. The object of both is to prevent oppression to the defendant; that he should not remain in

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custody on *mesne* process, or have his property detained for a long period, before it can be ascertained whether there was any foundation for the suit; that he should not be brought to a trial, and compelled to make a defence before he had a sufficient time therefor, or at an unseasonable or improper time of day or night. The interest of subsequent attaching creditors requires that the time, during which the property of their debtor is holden by a prior attachment, should not be longer than the period fixed by the statute, as their lien is postponed until the first is removed.

Both of these objects are entirely defeated, if it should be considered that such a service, as was made in this case, should be considered as merely voidable on the motion of the defendant. He might remain in custody, have his property withheld from him for any period of time, while the justice was in commission, be arrested on a writ returnable at an unseasonable hour in the night, and must wait, until the "day or time set for trial," to take advantage of this improper proceeding; and furthermore, his creditor might hold the property from him and his other creditors for the same length of time, if he was not disposed to appear at the return day, but should suffer a default. For these reasons, we come to the conclusion, that, by such an attachment, an officer acquires no right to the property attached, and that any other creditor may justifiably take it out of his possession on a regular writ, or execution, and that even the consent of the debtor will not make such an attachment good to hold the property. It is not before us to decide that a debtor, by appearing and pleading the general issue, might not, *so far as regards him*, be considered as consenting to the priority, and waiving, thereby, any advantage which he might otherwise have; but as regards those who have an interest in avoiding the attachment, such act of the debtor could have no effect.

The case of *Sewell v. Harrington*, 11 Vt. 141, does not conflict with the principles here recognized. A judgment in that case was rendered, and an execution, regular on the face of it, was delivered to the officer, who, by virtue thereof, took the property for which that suit was brought. Such an execution not only justified him in proceeding with it; but required him so to do; and it was clearly optional with the debtor whether he would take any measure to

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avoid the judgment. Whether, in a case similar to that where the officer filled up the writ of attachment, he could acquire any title to the property, or create any lien thereon, is not involved in the inquiry before us. In the case of *Smith v. Saxton*, 6 Pick. 483, it appears, that, in Massachusetts, it is considered no such lien is created. The defendant in that case resisted the attachment by disposing of the property attached. In the case of *Sewell v. Harrington* it was not decided or intimated that the officer, who filled up the writ, acquired any right in consequence of the attachment,—but, the judgment having been rendered thereon, and an execution having issued, any officer, who had the execution, was justified in levying the same, whether it was the one who had been instrumental in making out the writ, or any other, until the judgment was set aside.

The judgment of the county court is reversed. *



TOWN OF BLOOMFIELD v. JOHN M. FRENCH.

Where a minor, being a transient person, was taken sick in a town in which he had no legal settlement, and the town in which his father had a legal settlement,—which was also the place of legal settlement of the son,—voluntarily paid to the former town the money expended for the minor's support, it was held that an action would not lie therefor in favor of the latter town against the father, though he were of sufficient ability to support his son.

And, *Per HERBARD, J.*, if a judgment had been recovered in favor of the former against the latter town, for the money thus expended, even this would not enable the latter town to maintain an action therefor against the father.

But the town expending the money might unquestionably have recovered it of the father, by an action brought directly against him. *HERBARD, J.*

ASSUMPSIT for money paid, laid out and expended. Plea, the general issue, and trial by the court.

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The plaintiffs, on trial, offered evidence tending to prove, that, in the fall of 1841, the minor son of the defendant was in the town of Newbury, in this state, and there was in distress, and stood in need of immediate relief, and was supported by the town of Newbury for a considerable time, and died there; that the town of Newbury, soon after, commenced a suit against the town of Bloomfield, where the defendant had his legal settlement at the time his son became chargeable to Newbury, to recover the amount of the expenses incurred in said sickness; that the defendant had notice of the pendency of the suit, and neglected to settle the same by payment, or otherwise; and that the town of Bloomfield made no defence, but settled the suit by payment.

The defendant resisted the plaintiff's right to recover, on the ground that the town of Newbury had no cause of action against the town of Bloomfield, and that Bloomfield might have successfully defended said suit; that the defendant, and not the town of Bloomfield, (if any one) was liable; and that there was no express promise of the defendant to pay, nor any request that the town of Bloomfield should pay.

It was admitted that the defendant was of sufficient ability to maintain himself and family.

The court decided that the plaintiff was not entitled to recover, and rendered judgment for the defendant; to which decision the plaintiff excepted.

Fletcher & Young for plaintiffs.

1. The parent is legally bound to support his minor children at all events. 2 Kent 190-192; Rev. St. 104, § 13. If the father suffer his children to remain abroad, or force them from home by severe usage, he is liable for their necessities. 2 Kent 193.

2. The town of Bloomfield being liable to pay the town of Newbury, when called upon for said support, and having paid the same with the knowledge and consent of the defendant, the law will imply a promise on the part of the defendant to repay the same. 8 Vt. 209. A moral obligation is a good consideration for a promise to pay, and therefore may be the ground of an action of assumpsit. 1 Har. Dig. 150. Chit. on Cont. 11.

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3. A person, who goes into a town, where he has no residence, to work, or who does actual labor on a contract, is not, upon becoming sick, or disabled, liable to an order of removal, but is regarded as a transient person. *Bristol v. Rutland*, 10 Vt. 514; 4 Mass. 227.

— — — — — for defendant.

1. The payment of the claim of Newbury by Bloomfield was voluntary, and against the will and consent of the defendant.

2. The defendant being of sufficient ability, and the person taken sick being a *minor* child, no action could be maintained by either town.

3. The statute has prescribed the precise form of action, or remedy, against each and all, who are liable.

4. It is by virtue of the statute, and not by any principle of the common law, that any town, or any person, is made liable for the support of the sick and poor; and the remedy prescribed by statute can alone be resorted to. See Rev. St. 103, c. 16, §§ 12-14, 18.

The opinion of the court was delivered by

HEBARD, J.—The defendant unquestionably was liable by law, if able, to support his minor son; and the town of Newbury might have had its action against him for it. But the fact that Newbury sued the town of Bloomfield for such support, and recovered it of Bloomfield, lays no foundation for a recovery on the part of Bloomfield against the defendant. If the town of Bloomfield paid it voluntarily, there would be no privity between the town and the defendant. If Newbury had recovered it of Bloomfield, it would make it no better, for it must have been upon the ground that the defendant was unable.

The case in 14 Mass., 227, is no authority for this case. That case is at variance, in its whole length and breadth, with the case of *Bennington v. M^cGenness*, 1 D. Chip. 44. This court has repeatedly decided that there is no common law liability for the support of paupers. It is a statutory regulation. There is no *implied promise* against towns for money expended. *Aldrich v. Londonderry*, 5 Vt. 441.

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If there was any *liability* on the part of Bloomfield to pay this money to Newbury, that will not give Bloomfield any right of action against the defendant. A town cannot maintain an action against a pauper, for money expended for his support. *Bennington v. M'Genness*, before cited. Whether Bloomfield was liable to Newbury would depend upon the farther fact, whether the defendant was of sufficient ability. If he was, then Bloomfield should have defended the suit. If he was not, then Bloomfield was liable, and has no legal claim upon the defendant.

Judgment affirmed.



JOHN W. PUTNAM v. SPENCER CLARK.

Hay, or grain in the straw, may be attached by the officer's leaving a copy of the writ of attachment in the town clerk's office of the town where the property is situated; and the *leaving such copy* gives to the officer the constructive possession of the property, and title and possession sufficient to enable him to maintain an action therefor against any one who subsequently removes, or converts, the same.

It is not necessary, in such case, that the officer see the property, or go near it; and it is sufficient, if a copy of the attachment be left by him with the debtor at any time before the legal time of service upon the writ expires.

The officer, in such case, may maintain trespass against another officer, who, subsequent to the leaving the copy in the town clerk's office, and before the copy is delivered to the debtor, attaches and removes the same property by virtue of a legal writ of attachment against the same debtor.

TRESPASS for a quantity of hay and grain in the straw. Plea, not guilty, and issue to the court. The case was tried upon the following statement of facts agreed to by the parties.

"The hay and grain mentioned in the plaintiff's declaration was, on the 8th day of January, 1842, situated in the barn of Wm. Jewell, in Guildhall, about five miles from the town clerk's office in

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said Guildhall, and was the property of said Jewell. The plaintiff, on said 8th day of January, was, and, until March after, continued to be, constable of Lunenburg, with authority to serve writs through the county. On the said 8th day of January, 1842, George W. Gates, of Lunenburg, sued out a legal writ of attachment against said Jewell, properly directed, returnable at Lunenburg, before a justice of the peace, on the 20th of January, 1842, and delivered the same to the plaintiff; and on the same day, which was on Saturday, the plaintiff left in the town clerk's office of said Guildhall a true and attested copy of said writ, with his return, indorsed thereon, that, on said 8th day of January, 1842, he served said writ by attaching the hay and grain in question, and certifying that he caused said copy and return to be put on file in said office; and, on the 11th day of January, 1842, the plaintiff delivered the said Jewell a proper copy of the attachment, and of his return duly endorsed thereon; and, until the 11th of January, the plaintiff had not been within three miles of said property attached. Said Gates procured judgment against Jewell on the day of the return of said writ, and delivered his execution to a proper officer within thirty days thereafter, and said execution has been returned unsatisfied.

The defendant, on the 10th day of January, 1842, sued out a writ in due form against said Jewell, and on the same day delivered the same to the sheriff of Essex county, who, on the same day, by direction of the defendant, went to the barn of said Jewell, and saw and attached said hay and grain, which was turned out by said Jewell, and on the same day delivered to said Jewell a true and attested copy of the defendant's writ, and of his return of attachment thereon, and on the same day lodged in the town clerk's office of said Guildhall a true and attested copy of said writ, and his return of said attachment thereon. The defendant's writ was returned properly, and he procured judgment thereon against the said Jewell a day or two previous to the time when said Gates procured his judgment; and the defendant sued out a writ of execution on his said judgment, and, within thirty days, delivered the execution to the sheriff, and he, within thirty days after the rendition of the judgment, levied the execution on said hay and grain by direction of the defendant, and advertised and sold the same, at vendue,

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to the defendant; and the defendant, before the commencement of this action, used up said hay, and threshed out and carried away said grain. The officer, to whom the execution of said Gates was delivered, within thirty days after the recovery of said Gates' judgment demanded said hay and grain of the plaintiff; but the plaintiff did not deliver it up, for the reason that the defendant had so attached it as aforesaid.

If, upon consideration of the foregoing facts, the court should be of opinion that the plaintiff is entitled to recover, the damages are to be \$60.48; if otherwise, the judgment is to be for the defendant to recover his costs."

The court rendered judgment for the defendant; to which decision the plaintiff excepted.

W. Heywood for plaintiff.

This action depends upon the effect of an attachment of hay and grain made as directed by the Revised Statutes, page 181, c. 28, § 15.* The defendant contends, that, because the plaintiff did not deliver to Jewell, the debtor, a copy of the writ until the day after the defendant had made his attachment, the plaintiff's attachment was void. We answer to this that it is not the delivery of the copy to the debtor that effects the lien. If the copy was left with the debtor six days before the day of court, it was sufficient; and even if it had been left but five days before, and the debtor had appeared and answered to the suit, without pleading in abatement, it would be as effectual as any other service. And the same question is so treated in the case of *Newton v. Adams et al.*, 4 Vt. 437. The result of the reasoning in that case, is, that the object of leaving a copy of the writ with the debtor, or at his usual place of abode, is to

*Which section is, "When hay, grain in the straw, &c., shall be taken by virtue of any writ of attachment, or execution, the officer serving such process shall lodge a copy of the same, with his return, in the town clerk's office in the town where such property is taken, which shall be as effectual to hold such property against all subsequent sales, attachments, or executions, as if such property had been actually removed and taken into the possession of such officer."

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give him notice of the suit ; and it is not necessary, in order to give others notice of the attachment ; and the attachment, in a case like the present, is made notorious to every one but the debtor, by leaving the copy at the town clerk's office. See *Lowry v. Walker*, 4 Vt. 76 ; *Stanton v. Hodges*, 6 Vt. 64.

J. A. Wells for defendant.

1. To constitute a valid attachment of personal property, the articles should be taken into the actual custody of the officer, or placed under his exclusive control. 2 N. H. Rep. 68 ; 1 Wils. 44 ; 9 Johns. 132 ; 5 Mass. 157, 163, 271. An attachment is effected by *seizing* the property. 4 Vt. 444. Such possession should be taken as to give notoriety to the attachment, and to exclude acts of dominion over it by others. *Ib.* 445. To render a *sale* valid against subsequent purchasers, or attaching creditors, possession must accompany and follow the sale ; and an attachment must have the same character. 7 Vt. 406.

Goods and chattels *being attached*, or taken by virtue of legal process, the next step is to preserve the lien thus acquired ; which can be done in two ways, independent of the statute, viz. by *removal*, or by placing an agent over them. 12 Mass. 134. But the legislature, considering the great expense and loss attendant upon removal of certain kinds of property, have authorized another mode of retaining the lien acquired by attachment, to wit, the lodging of a copy of the precept and return in the office of the town clerk. The language is, "The officer *serving* such process shall lodge a copy of the same, *with his return*, in the town clerk's office." Here the word *serving* implies an act by the officer, precedent to the act of leaving the copy. He shall leave a copy of his precept "*with his return*." What return ? Manifestly the return of what he *had* done in *serving* the precept ; and in *serving* the precept the act to be done was the attachment of the defendant's property. Having so done, he could leave an agent in possession, until he went to the clerk's office and gave the statute notice of his doings to perfect his lien, or perhaps the law would extend to him *reasonable time* in which to make his copy and return, and carry the same to the town clerk's office.

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But, should the court determine that it is unnecessary for an officer to take possession, or control, of the kinds of property specified in the statute, then we insist that the *delivery* to the debtor, or leaving at his house, a copy of the precept and a list of the property, *constitutes the attachment*; and that, until that is done, the officer acquires no right, even though he *has left* a copy with the town clerk. Without this the debtor would certainly be justified in selling, and an innocent vendee in purchasing; and if, under such circumstances, a sale would be valid, manifestly an attachment would bind. 7 Vt. 406. To hold a sale under such circumstances void would be most severe and unjust.

2. The defendant's attachment was, in fact, precedent to that of Gates. The language of the law is, "*When the goods or chattels of any person shall be attached at the suit of another, a copy of the attachment and list of the articles attached shall be delivered to the party, whose goods or chattels are so attached, or left at the house,*" &c.; Rev. St. 180, §13. This statute, in terms, requires that the copy and list shall be delivered to the debtor *at the time of the attachment*. It is an act required to be done to give a complete lien upon the property; it is part and parcel of the attachment, and, by the statute, is required to be done *at the time the officer assumes to control the property*. The Revised Statute upon this subject is a copy of the old law; and the case of *Pearson v. French*, 9 Vt. 350, distinctly recognizes the principle that *the leaving the copy with the debtor is necessary to perfect an attachment*. If so, by the imperative requirement of the statute the copy should have been given to the debtor on the 8th day of January.

But if the plaintiff insists that the statute gave him a *reasonable time* in which to leave his copy, *then* we insist the case is with the defendant, as the copy was not thus left. The plaintiff commenced his proceedings on the 8th, and omitted any farther action until the 11th. Having commenced his work, he was not at liberty to suspend, and renew it at a subsequent time, unless some insurmountable obstruction interposed. The case of *Pearson v. French*, before referred to, is an authority upon this subject. See, also, 4 Vt. 444.

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The opinion of the court was delivered by

WILLIAMS, Ch. J. To constitute an attachment of property, it is necessary that the attaching officer take the same into his custody and possession. After the attachment, the officer must give notice to the debtor by delivering a copy, according to the requisition of the statute, before the time of service is out, or he will be considered as abandoning the attachment, and might possibly be treated as a trespasser *ab initio*. Between the time of attaching and delivering the copy, the officer must be considered as having a title to the property, and his possession as being legal against all others. When hay or grain is attached, the officer may leave a copy with the town clerk; and this is equivalent to and declared to be as effectual as if such property had been actually removed and taken into the possession of such officer. He is considered as having the constructive possession, and as having a sufficient title and possession to maintain an action therefor against any one who removes or converts the same. *Lowry v. Walker*, 4 Vt. 76. It cannot be necessary for the officer to go to the place where the property is situated, to make the attachment, any more than it would be to attach land, or real estate. Leaving a copy with the town clerk is the act of attaching and taking possession and giving notice to all concerned.

The plaintiff, in this case, having attached the hay and grain, on the 8th of January, by leaving a copy with the town clerk, and having perfected his attachment by giving the debtor a copy on the 11th of January, more than six days before the time set for trial, and a judgment having been rendered thereon, and the execution having been issued and delivered to an officer in season to charge the property, had such a title and possession as was sufficient to enable him to maintain this action. The defendant, who caused the same hay and grain to be attached on the 10th of January, acquired no right thereto by his attachment and the judgment and execution thereon, but his sale on the execution was an invasion of the rights of the plaintiff, for which this action is an appropriate remedy.

The judgment of the county court is therefore reversed, and judgment must be rendered for the plaintiff.

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SILAS CHESMAN v. GORHAM LANE.

The defendant filed a plea in offset to the plaintiff's demand, but, at the first trial, submitted no proof in support thereof, and the plaintiff recovered a judgment for his whole claim. The defendant then, by leave of court, filed an additional plea in offset, founded upon the same subject matter, and, at a subsequent term, introduced evidence, and so far sustained his offset, that the plaintiff recovered judgment for but a part of his claim; and it was held that the plaintiff was not entitled to a review.

ASSUMPSIT on a promissory note for \$548.90. The defendant pleaded the statute of limitations and a plea in offset. The plaintiff replied a new promise to the plea of the statute, and the statute of limitations to the plea in offset, and the respective issues were joined.

At the first trial there was no evidence offered in support of the plea in offset, and on that branch of the case there was no hearing. The plaintiff recovered judgment for the amount of the note and interest. The defendant entered a review. Subsequently to that trial, the defendant, by leave of the court, filed an additional plea in offset.

At the second trial there was a full hearing upon all the issues, and the plaintiff recovered judgment for but \$243.44. Whereupon the plaintiff moved for a review of the case. The motion was overruled, and the plaintiff excepted.

W. Heywood, Jr., for plaintiff.

The review prayed for by the plaintiff should have been allowed. *Hall v. Wolcott*, 10 Mass. 218; *Rice v. Townsend*, 14 Ib. 366; *Bloss v. Kittridge*, 4 Vt. 273; *Baker v. Blodgett*, 1 Aik. 342.

As to the construction of statutes, it is said, in *The People v. Utica Ins. Co.*, 15 Johns. 358, that "A thing within the intention is as much within the statute, as if it were within the letter; and a thing within the letter, if contrary to the intention, is not within the statute." And see *Griswold v. National Ins. Co.*, 3 Cow. 96. *Holbrook v. Holbrook et al.*, 1 Pick. 248.

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Young for defendant.

No review is allowed by statute in any case, where judgment shall have been rendered twice for the same party; Rev. St. 160, § 9. It is said, that, for the sure and true interpretation of statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be considered; 1, What was the common law before the making of the act; 2, What was the mischief and defect against which the common law did not provide; 3, What is the remedy; 4, The true reason of the remedy. 3 Co. Rep. 7.

At common law, there was no review of cases as matter of right, but it was within the discretion of the court, for sufficient reasons and causes assigned by the party. In England a new trial will not be granted, after a full trial by a competent jury, if no fresh light can be thrown in. *Camden v. Cowley*, 1 W. Bl. 418, [2 Har. Dig. 1522.] *Hankey v. Trotman*, 1 W. Bl. 1. *Farwell v. Chaffey*, 1 Burr. 54; *Graham's Practice*, 510—517. *Deacle v. Hancock*, 13 Price, 226,—M'Clel. 85,—cited 2 Har. Dig. 1526.

In this case, unless the plaintiff is entitled to a review on the statute, there is no pretence that he is entitled to a new trial. In the construction of a statute negative words will make a statute imperative. *Rex v. Leicester Justices*, 9 D. & R. 772,—7 B. & C. 12,—cited in 3 Har. Dig. 2056; *Dwarris on Statutes*, 715; 9 Law Library. The words of the statute are, "no review shall be allowed" in the several cases mentioned,—this being one. When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of public utility, when the end of the act appears to be larger than the enacting words. *Dwarr.* 697. Statutes in derogation of common right are to be construed strictly. *Dwarr.* 728. A statute which is to take away the common law ought never to have an equitable construction. *Dwarr.* 729.

The opinion of the court was delivered by

HEBARD, J. All the right that either party has to a review of the case is given him by statute, and of course must be limited and confined to such cases as the statute has enumerated. The

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statute, after making provision for the review, makes the exceptions in which it will not be granted, and among others is the following,—“When judgment shall have been rendered in any cause twice for the same party.” Here were two judgments for the same party; but it is insisted that the *cause*, in which the last judgment was rendered, was different from the first. I am more willing to admit the *ingenuity* of the reasoning, than the *soundness* of it.

The *cause* must have been that in which the plaintiff's right to a judgment consisted; and it does not appear, nor is it pretended, that the plaintiff had any different cause of action at the last trial, than at the first. That the defendant had any different defence does not appear; it appears that he filed an additional plea in offset, but it does not appear that it was for any different or new matter,—and the presumption would be the other way.

That the defendant submitted no proof on the first trial, in support of his offset, could make no difference. He thereby deprived himself, equally with the plaintiff, of the advantage of two trials. That the defence consisted of an offset makes no difference. He might have had a defence consisting simply in proof, denying the plaintiff's cause of action, and, as a matter of policy, he might have withheld his proof until after the plaintiff had obtained one judgment. But our statute is *explicit* and *direct*, and so plain as hardly to admit of a construction.

The plaintiff has recovered two judgments. Whether justice was done by the last judgment, we have no means of knowing; and it is not a subject of inquiry by this court. We are always bound to presume, that, when the parties have had a fair and legal trial, justice has been done. At any rate, it has been the policy of the law to limit the number of trials in such a way as to prevent unreasonable delay in the termination of suits.

Judgment affirmed.

Hopkinson, Adm'r, v. Watson et ux., Adm'rs.

DORCAS HOPKINSON, Administratrix of JOHN HUGH, v. H. L. WATSON and WIFE, Administrators of JESSE HUGH.

When a deposition is taken *ex parte*, the magistrate must certify the reason why the other party was not notified; and the court cannot judicially take notice of any facts, as a reason for omitting to notify the party, which do not appear from the certificate.

The omission, in the certificate, of the *initial letter* of the middle name of a party, is no reason for rejecting the deposition, when the party is, in other respects, correctly described.

APPEAL from the decision of commissioners; the declaration was in assumpsit; plea, the general issue, and trial by the jury.

In the course of the trial, the defendants offered the deposition of Sarah Warren, which was objected to by the plaintiff, for the reason that it appeared in the caption of the deposition that no notice was given to the adverse party, and it was not certified that the adverse party lived more than twenty miles from the place of caption, as required by the laws of the state of New Hampshire, where the deposition was taken, in order to entitle the party to take the same *ex parte*. The objection was overruled and the deposition admitted. The same objection was made to several other depositions offered by the defendant, and was overruled by the court. The defendants also offered the deposition of Lucy Willard, which was objected to by the plaintiff, on the ground that the parties to the suit were not correctly described in the caption of the deposition, the initial of the middle name of Roxana H. Watson, one of the defendants, having been omitted; which objection was overruled and the deposition admitted; to all which decisions the plaintiff excepted.

After argument the opinion of the court was delivered by

WILLIAMS, Ch. J. We are satisfied the deposition of Sarah Warren was improperly admitted in evidence by the county court. The certificate does not state any reason why the adverse party was not notified. Our statute requires notice to the adverse party, if within thirty miles, whether the party resides within the state or not.

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The statute of New Hampshire requires notice to the adverse party, unless the party is out of the state, and more than twenty miles from the place of caption, and from the party proposing to take the deposition. In this case the plaintiff was not notified, and it is not certified, by the magistrate taking the deposition, that the plaintiff resided out of the state, or more than twenty miles from the place of caption. As we cannot judicially take notice of any facts, to authorize the taking a deposition, which do not appear from the certificate, we cannot say there was any reason for taking this deposition *ex parte*.

The objection to the deposition of Lucy Willard is not valid. The parties were correctly described; and the omission of the initial letter in the middle name of Roxana H. Watson was of no consequence whatever. The admission of the deposition of Sarah Warren, and of the others similarly certified, was erroneous; and for these reasons the judgment must be reversed.



DANIEL WASHBURN, JR., and WIFE, v. JOHN DEWEY.

[IN CHANCERY.]

A contract, by which the defendant agreed to deed certain lands to a married woman, on payment by her of a note executed by her husband, cannot be connected with other independent contracts or notes held by the defendant against the husband, so as to render the insolvency of the husband, or his inability to perform his contract, any excuse for the defendant in not performing his contract with the wife.

So the inconvenience to which it may put the defendant to part with the land, or the fact that the orators might have recovered damages at law for his non-performance, is no reason why a specific performance should not be decreed by a court of equity, when the wife has tendered performance of the contract upon her part.

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A tender of performance of a condition precedent, as the payment of a note, entitles the party to a performance on the other side; and no farther offer is required, nor is it necessary to bring the money into court, until the defendant demands it.

A motion to dismiss a bill in chancery, because the matter in controversy does not exceed fifty dollars, should have been presented to, and acted on by, the chancellor, or it cannot be noticed in this court.

APPEAL from the court of chancery. After the entry of the appeal in this court a motion to dismiss the bill was filed by the defendant, because, as he alleged the matter in controversy did not exceed fifty dollars.

The orators set forth in the bill, in substance, that, on the 3d day of May, 1838, the oratrix contracted with the defendant to purchase of him 45½ acres of land; that she was then, and at the time of the filing of the bill, the wife of the said Daniel; that the defendant executed to her a writing, whereby he promised, that, if she should, on or before the 25th day of April, 1839, pay to the defendant a note due from the said Daniel to him, dated the 25th day of April, 1838, for \$120, he would convey to her the said land; that on the 12th day of April, 1839, the oratrix tendered to the defendant \$120 in full payment of the said note, and demanded a deed; and that the defendant refused, and had ever after neglected, to execute and deliver said deed. And the orators prayed that the defendant might be decreed to execute a deed of the premises to the oratrix, according to his contract.

The defendant in his answer alleged, that the contract for the purchase of the land in question was made by the said Daniel, and that the \$120 note had been given for the same; that it was at his sole request and procurement that the promise to convey the premises to his wife was executed; that, previous thereto, the defendant had contracted with the said Daniel to convey to him a certain portion of a lot of land, of which the said 45½ acres formed a part, upon the payment of the sum of \$330 therefor; that the said sum of \$330 remained unpaid, and the said Daniel had become insolvent; that the occupancy of said 45½ acres of land was neces-

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sary to the enjoyment and use of the land so contracted to be sold to the said Daniel, the payment for which could not be enforced against him, and the severance from which of the 45½ acres by conveyance, as sought to be enforced by the orators, would work great injustice to the defendant; and claiming that he ought not to be compelled to convey to the wife of the said Daniel said 45½ acres, until the said Daniel should pay to the defendant as well the said \$330, as the \$120 contracted to be paid for the 45½ acres as aforesaid. The defendant admitted the tender of the said \$120, as by the orators alleged.

The answer was traversed and testimony taken; and the court of chancery decreed that the defendant convey the premises to the oratrix, upon certain terms specified; from which decree the defendant appealed.

— for orators.

J. Dewey, pro se.

1. Though the oratrix tendered the money properly before the time specified, yet the tender was not kept, and brought into court when this bill was entered. *Bailey v. Metcalf*, 6 N. H. Rep. 156; *Chipman v. Bates*, 5 Vt. 143; 1 Swift's Dig. 296.

2. The contract in question was made with the wife during coverture. It is the same is if made with the husband, and is subject to the same equities. *Shuttlesworth v. Noyes et al.*, 8 Mass. 229; 1 Chit. Pl. 19.

3. The husband could not require the specific performance of this contract, without first doing equity. He should pay the \$330, and take the defendant's interest in the remainder of the farm, before he could require the defendant to convey the 45½ acres.

4. The orator's remedy at law, on the contract, was perfect, and no reason is alleged in the bill why there should be a specific performance.

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The opinion of the court was delivered by

WILLIAMS, Ch. J. The case is a very clear one for the orators, and I cannot see why it was brought here on appeal. The defendant, on the 3d day of May, 1838, made a contract, by which he became under obligation to deed to the wife of Washburn a certain piece of land, on her paying him a note which he held against her husband. The wife was the person to be benefited, as appears abundantly both from the proof and the contract itself. Payment of the note was tendered. The case of the orators was therefore fully made out.

The excuses for not performing this contract are, if not frivolous, at least very unsatisfactory. The oratrix, having tendered to the defendant the money for the payment of the note, had nothing farther to do, until the defendant manifested his willingness to comply with his obligation, and demanded the money. There is no pretence, therefore, for saying the "tender was not kept good."

The defendant made this contract for the benefit of the wife, and undoubtedly understood the nature and extent of his contract, the subject about which he was contracting, and the parties to the contract. It is manifestly unjustifiable, as well as inequitable, to attempt to connect this transaction with other notes and contracts which the husband had made with the defendant, and which were in existence at the time the defendant made the contract, the performance of which is insisted on in the orators' bill. The insolvency of Washburn, or his inability to fulfil his contracts, affords no legal or equitable excuse to the defendant for not performing his contract with the wife of Washburn.

The value and situation of the 45½ acres, as part of the farm, may render it desirable for the defendant to retain it; but if so, he should not have contracted and agreed to deed it to the oratrix. The orators might have recovered of the defendant, at law, damages for the non-performance of the contract; but that is no reason why they should not have a decree for a specific performance. The remedy at law might not be adequate, and they had clearly a right to select the remedy in chancery.

The motion to dismiss is wholly unfounded. In the first place

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the facts on which it is attempted to be sustained are not proved. The matter in controversy is clearly more than fifty dollars. In the second place, the motion does not appear to have been presented to, and acted on by, the chancellor.

The decree of the chancellor is affirmed, with an alteration as to the time in which the orators are to pay the amount of the note, and the defendant to deed the land; and the cause will be remanded to the chancellor, with proper directions to carry the same into effect.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORLEANS.
MARCH TERM, 1848.

PRESENT.

HON. STEPHEN ROYCE, HON. MILO L. BENNETT, HON. WILLIAM HERARD,	}	ASSISTANT JUDGES.
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BROWN, MAY AND OTHERS v. JOSIAH WRIGHT.

A recital, in the deed of a collector of a land tax, that "he has in all things pursued the directions of the statute," is not *prima facie* evidence of such fact; but the person claiming under such deed must show that every substantial requisite of the law was complied with.

When no possession has been taken under such deed, no presumption in its favor can be claimed from its antiquity,—but rather the contrary.

If the warrant to such collector mis-recited the time at which the statute was enacted, by virtue of which the tax was levied, the warrant is void, and the collector's deed of land sold under it will convey no title.

VERDICT for a lot of land in Newport. Plea the general issue, and trial by jury.

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The case came to this court on exceptions taken by the defendant to the decisions of the court below. The point on which the case was decided, and the facts connected therewith, appear in the opinion of the court, which, after argument by *Colby* and *Smalley & Adams* for defendant, and by ——— for plaintiffs, was delivered by

BENNETT, J. This was an action of ejectment, brought to recover "a division lot drawn to the right of one Fisk, situate in Newport." The plaintiffs' title depends upon the legal effect of a vendue deed from S. Pearl to S. Knowlton, bearing date the 7th of March, 1795. The tax, for the non-payment of which it is claimed the land now in dispute was sold, is what is called the half-penny tax, granted in 1791, for the purpose of paying to the state of New-York the sum of thirty thousand dollars, which this state had assumed to pay. Though this case has been argued at great length, and many objections taken to the validity of the collector's proceedings, yet we shall have occasion to travel over but a small portion of the ground. The principle governing our courts in regard to vendue titles has been, to inquire whether all those acts have been done, which the statute has required. If so, then the sales have been held valid, but otherwise not.

The collector has, in this case, certified, or recited, in his deed, that "he has, in all things, pursued the directions of the statute." It has frequently been claimed that such a recital makes out a *prima facie* case in favor of the tax title, and that the *onus probandi* of impeaching the title is thus cast upon the other party. Such a doctrine was promulgated in *Powell v. Brown*, 1 Tyler 236, and in *Parker v. Bizby et al.*, 2 Tyler 466. I conceive the general proposition is, that every party who sets up a title must show all those facts which are necessary to support it. If the validity of the title depends upon matter *in pais*, there is the same reason why the party should be bound to prove it, as there would be, that he should prove any matter of record upon which the title was to depend. The collector has no general authority; but his power is a special one, not coupled with an interest, and he can only sell lands in such particular cases as are provided for in the statute; and those cases must be shown to exist, or else his power cannot arise. I

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know of no principle that will make the certificate of the collector evidence, against a stranger to the deed, of the existence of those facts from which his special powers are to arise. See *Jackson v. Shepherd*, 7 Cow. 88; *Williams v. Peyton's lessee*, 4 Wheat. 77; *Rockendorf v. Taylor*, 4 Pet. 359; *Hall v. Collins*, 4 Vt. 316, per BAYLIES, J. To divest a person of his property against his consent, under a special authority, great strictness is required. Every substantial requisite of the law must have been complied with, and the person, who claims under the tax title, must take upon himself the proof of the regularity of the proceedings. This has been the repeated doctrine of our courts. Nothing can be claimed by the plaintiffs from the antiquity of the collector's deed. There having never been a possession under the title, it is rather a presumption against it. See *Richardson v. Dorr*, 5 Vt. 17.

The plaintiffs claim that they have shown a compliance with all the requisitions of the statute granting this tax. We shall consider but a single objection. The statute granting the tax was passed the 3d day of November, 1791; and, by the 1st and 2d sections, the treasurer was directed to issue his warrants to the respective constables and sheriffs between the first day of March and first day of November, 1792, for its collection. The additional act, passed in 1792, relating to the collection of this tax, and intended to remove difficulties attending it, provided for the issuing of the warrants without limitation as to the time. See Statute, Tolman's Ed., p. 243. As the time specified under the act of 1791, for issuing the warrants, had expired before the statute of 1792 was passed, this must have been, in effect, an entire and independent provision, in that particular. The plaintiffs have given in evidence a record copy of the warrant, upon which they rely,—the original warrant having been recorded in the clerk's office of Chittenden county, under the provisions of the act of 1803. Passing over all questions that have been raised in regard to the delivery of the warrant to the sheriff, we will come directly to the warrant itself.

The warrant purports to have been issued by the treasurer on the 10th day of November, 1792, and recited the tax to have been levied by virtue of acts dated October, 1791, and November, 1792, and purports to empower the sheriff to collect said tax agreeably to

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the said acts. The act granting the half-penny tax was passed the 3d day of November, 1791, and in 1792 no act was passed granting any such tax as is specified in the warrant. The acts of 1792 are simply in addition to the act of November 3, 1791, granting the tax, and only relate to its collection. In *Spear v. Ditty*, 9 Vt. 283, it is said by the judge, in delivering the opinion of the court, that sales for land taxes are proceedings *in invitum*, and, being a mode of transferring title by operation of law, without the agency of the owner, and in the nature of a forfeiture, that the proceedings are, as conditions precedent, to be strictly followed; and the judge adds, "perhaps, literally." In *Culver v. Hayden*, 1 Vt. 359, we have an exceedingly strong case. There it was held, that the omission, in the collector's advertisement, of the place where the legislature held their session, when the tax was granted, was fatal to the tax title. This was upon the ground that the form of the advertisement had been prescribed by the legislature, and in which a blank had been left to be filled up with the place where the legislature held their session; and hence the court held it imperative, even though, when the form was prescribed, the legislature were ambulatory, having no permanent place of session, but when the act was passed granting the tax, they had a permanent seat fixed by law.

The present case, however, is one vastly different. The warrant, by mis-reciting the time when the act granting the tax was dated, [passed] has nothing to stand upon. No such statute, as that recited, existed. The rule in pleading a statute is, that if the party recites a statute as made upon a certain day, which was not made upon that day, he has failed, because he has recited a particular statute, and there being no such one, his pleading is grounded upon that which does not exist. 6 Bacon's Abr. 396. Certainly, in the proceedings for the sale of lands for the non-payment of taxes, as much strictness and certainty should be required, as, by the principles of pleading, is required in pleading statutes. We all think that this objection is fatal to the title of the plaintiffs. Though we might think there were other objections equally fatal, yet it is of no importance to consider them.

The result is, the judgment of the county court is reversed, and the cause remanded for a new trial.

Felker v. Emerson.

DAVID FELKER v. S. P. W. EMERSON.

An officer, when serving a writ and attaching property, acts as the agent of the plaintiff; and when the parties to the writ have dissolved the attachment by settling the suit, the officer has no farther lien upon the property attached, and has no right to retain it in his hands as security for his services.

TROVER for a wagon, two horses, several head of neat cattle, and a quantity of hay. Plea, not guilty, and trial by jury.

It appeared, on trial, that the property sued for was attached and taken by the defendant, as deputy sheriff, in February, 1841, on two writs of attachment in favor of one Enos against the plaintiff, and that, immediately upon the attachment being made, all the property, except the hay, was received by the defendant, and put into the care and keeping of one Merrill, a neighbor to the plaintiff; that the hay in question was carried from time to time from the plaintiff's barn to a barn of said Merrill, and there fed to the horses and cattle so attached, which was done, as the jury found, by the plaintiff's consent and approval; that in April, 1841, the plaintiff and said Enos adjusted the suits,—the said Enos agreeing to give farther time for payment of the debts,—and agreed that the attachments should be dissolved; that the plaintiff immediately thereafter demanded said wagon, horses and cattle of the defendant, who expressed his willingness to restore the same, provided the plaintiff would pay what was justly due to him for his care, time and expense in keeping the same; but the plaintiff refused to pay said demand, and the defendant refused to surrender the property for that reason; that this action was thereupon immediately commenced; and that some time afterwards the defendant restored said property. It farther appeared, that, upon the occasion of arranging and compromising said suits in favor of Enos against the plaintiff, Enos agreed to pay for the writs and service, and the fees of the justice; but it did not appear that any agreement was made as to the expense of keeping the property so attached.

The court charged the jury, among other things, that, in the absence of any consent or agreement of Enos to pay for the keeping,

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the defendant had a lien upon said property, as against the plaintiff, for the necessary and reasonable expense of keeping the same, and was therefore not bound to restore it upon the plaintiff's demand, until said expense was paid or settled by the plaintiff; to which, after verdict and judgment for defendant, the plaintiff excepted.

C. W. Prentiss and Redfield for plaintiff.

The question in this case is, has an officer a lien, after the discontinuance of an action, on property attached by him, for his care in keeping the same? In the case of *Johnson v. Edson*, 2 Aik. 299, it is said, "If final judgment be rendered for the defendant, the attachment is *ipso facto* dissolved, the special property of the sheriff ceases, and with it all lien upon the chattels, whether for the expense of keeping, or otherwise." Can that be distinguished in principle from the case of a *discontinuance* of the suit by agreement of the parties?

But the case of *Adams v. Abbott*, 2 Vt. 383, is nearer to the present case than the one above cited, and would seem to be decisive. That was where a *nonsuit* was entered by the plaintiff in the original suit. But the language of the court is general, and applies to every case, whether of nonsuit or any other *discontinuance*. And we contend that there is no difference in principle, so far as regards the dissolution of the lien, between a judgment for the defendant, a nonsuit by the plaintiff, or a discontinuance of the action by mutual agreement. Whatever destroys the lien, created by the attachment, destroys every other lien. The officer has no lien for the keeping and care of the property. It is only a right to the possession for the purpose of selling according to law.

It has been decided in the case of *Dean v. Bailey*, 12 Vt. 142, "If the debtor settles the debt with the creditor, so that no execution comes into the officers's hands, on which to make sale, he may sustain an action against the debtor for the keeping." It was so decided also by this court, in Orange County, in the case of *Jackson v. Scribner*, not reported. But that case goes no farther than to apply to cases where there has been a *judgment* against the debtor. It of course cannot be understood to refer to the case of a judgment for the defendant. But if it refer to all cases, whether before or

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after a judgment, where the defendant settles the debt, which is perhaps its meaning, it does not apply to cases where the action is discontinued by agreement of the parties, and there is no settlement of the debt. Such a rule would, probably, in half the cases to which it might be applied, operate as unjustly as a rule that the officer might sustain an action for the keeping, against the defendant, when he recovers a judgment in his favor.

Smalley & Adams for defendant.

If a person be obliged by law to receive goods, he has a lien on them for any debts contracted in the execution of the purpose for which he is obliged to receive them. *Montague on Lien*, 26; *Naylor v. Mangles*, 1 Esp. R. 109; *York v. Greenough*, 2 Ld. Raym. 866, reported in *Montague on Lien*, Appendix, page 4.

The defendant was bound by law to take the property in question into his custody and keep it; consequently the law gave him a lien on the property for the expense of keeping. The plaintiff was bound to pay the defendant for the expense of keeping the property, and if he wished to avoid that expense, it was his duty to have replevied it. *Dean v. Bailey*, 12 Vt. 144.

If the defendant had surrendered the property on demand, still he might have maintained an action against the plaintiff for the expense of keeping. *Jackson v. Scribner*, in Orange county, cited by Collamer, J., in *Dean v. Bailey*. But the officer is not bound to resort to an action, but may insist on his lien. The plaintiff might as well insist that the defendant would have been bound to pay for the plaintiff's board, if his body had been arrested, as to insist that he was bound to pay for keeping his cattle, when attached.

The opinion of the court was delivered by

HEBARD, J. Had the officer a lien upon this property for his services, after the attachment was dissolved by a settlement of the suit? In making this attachment the officer is the agent and servant of the plaintiff, and, before the attachment is dissolved by a settlement of the suit by the parties, or by a final judgment in favor of the defendant, he has an *imperfect* lien upon the property. But

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there are a variety of ways in which the lien may be lost. If the defendant in the suit recover a final judgment in the suit, the attachment is dissolved, and justice would not require that he should be pursued with a *false clamor*, and lose the use and possession of his property, and then be compelled to pay the officer for his charges in keeping it. If the defendant decease before judgment, the attachment is dissolved, and the property returns to the administrator. If the attachment is pursued to final judgment, the lien then becomes perfected. Before that, it was imperfect.

The case finds that this attachment was dissolved by the adjustment of the suit. And such is the legal effect of an adjustment, or settlement, of a suit. What considerations operated upon the mind of the creditor, to induce him to discontinue the suit, it is not for us to conjecture. There might have been a variety. He might have obtained better security for his debt, by giving farther time of payment, or he might have discovered some informality in the proceedings, or some deficiency in his proof, which he could supply at some future time; or it might have been something else. It was voluntary on his part. He might have insisted upon his attachment, if he chose; and when he chose to make the adjustment, he might have stipulated for the payment of the expenses of keeping the property, before discharging his lien. This is a statutory inconvenience, to which the debtor is subjected, in having his property taken upon *mesne process*, and we are not disposed to extend the inconvenience farther than a fair construction of the statute would warrant. The officer is in no danger of being injured. It is not for his security that we are called upon to adopt this principle. He is in the employ of the creditor, and if the creditor voluntarily dissolves the lien created by the attachment, by settling the suit, the officer has the same claim upon him for his charges, that he would have in a case where the *lien* was lost by a final judgment in favor of the debtor.

Judgment reversed.*

*The proceedings in this case at a subsequent term of the Supreme Court will be found reported in Vol. 16 of Vt. Reports, page 653.

Elkins v. Parkhurst.

JONATHAN ELKINS v. LEVI M. PARKHURST.

When a note is payable in specific articles on a day certain, no demand is necessary before bringing the suit;—otherwise, *Per BENNETT, J.*, if payable on demand.

If, upon a note payable in leather on a given day, the defendant turn out leather unsealed, which, by law, is required to be sealed before it is offered for sale, or if he turn out leather which has been sealed as bad leather, such tender cannot avail the defendant as a bar to an action on the note.

If a note be made payable in leather, without any designation of the quality, the holder has a right to require that it shall be of *merchantable* quality.

A contract in contravention of the terms of a statute is void, although the statute inflict a penalty only, because such penalty *implies* a prohibition.

Every proper intendment is to be made, to sustain a verdict; and it is the duty of the excepting party to show affirmatively that error intervened on the trial.

Assumpsit on a promissory note, dated in November, 1839, whereby the defendant promised to pay to the plaintiff, by the middle of February next following, 125 good merchantable sap buckets, or \$20 worth of leather, to be delivered at the defendant's shop in Troy. Plea, the general issue, and trial by jury.

On trial the plaintiff offered no evidence tending to prove that the buckets, or the leather, mentioned in said note, had ever been demanded of the defendant before the commencement of this action. The defendant contended that the plaintiff was not entitled to recover, without proof of such demand; but the court decided that no demand of payment was necessary.

The defendant then offered evidence tending to prove, that, on the 12th day of February, 1840, when neither the plaintiff nor his agent was present, the defendant set apart, in his shop at Troy, a quantity of leather of different descriptions, and of the value of twenty dollars, or more, saying, in the presence of witnesses, that he turned out said leather in payment of the note in question. And the evidence tended farther to show that said leather remained in the shop, unmixed with other leather, to await the call of the plaintiff, until long after the middle of said February; but that the

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plaintiff did not come, either in person or by his agent, on the said middle of February, to the defendant's shop, to receive said leather.

The court charged the jury, among other things, that, if the leather tendered and offered by the defendant, in payment of the note, was not sealed at the time of his tender, or when said note fell due, or, if the leather thus tendered was sealed with the letter B, the tender was invalid, and would not operate as a payment of the note, and would not avail the defendant in this action; to which charge, after verdict and judgment for the plaintiff, the defendant excepted.

Smalley & Adams for defendant.

1. The plaintiff cannot maintain this action without demanding payment before suit.

2. Any kind or description of leather, that was marketable, could be legally tendered in payment of this note. The charge of the court, that, if the leather tendered was not sealed, the tender was invalid, cannot be sustained. The statute, Slade's ed. 408, § 3, requires neat's leather, calves' skins, and tanned horse or colts' hides, only, to be sealed. Tanned sheep skins, goat skins, dog skins, deer skins and hog skins, which are leather, are not within the operation of this act. The term neat's leather includes only leather manufactured from the skins of horned cattle. Rev. Stat. 358, § 41. Under this charge, the jury could not return a verdict for the defendant, if, among the leather tendered, there was one sheep skin, goat skin, dog skin, hog skin, or deer skin unsealed. This act is penal in its character, and cannot be extended, by construction, to embrace any description of leather not mentioned in the act. 1 Bl. Com. 88, § 3.

C. W. Prentiss for plaintiff.

The statute passed Nov. 9, 1797, on the subject of sealing leather, is the only one applicable to this case. Slade's Comp. Laws, 408. By this statute it is made the duty of the leather sealer "carefully to examine such leather as shall be offered to him for inspection, and, such as he shall find *not fit for market*, to stamp or seal with the letter "B."

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The question, then, is reduced merely to this inquiry, whether leather which is not fit for market is a legal tender on a note payable in leather? See Chipman on Contracts, 32, 33, 34; 1 Swift's Dig. 291.

It would seem, that, on such a note, the leather which is offered in payment must be at least of the lowest quality of merchantable leather. It need not be of an average quality. Leather which is marked "B" has no merchantable character. And it would be too much to say that the parties to a contract for leather had in contemplation leather of this kind.

It may be said, that a note payable indeterminately in leather does not come under the same rule, in regard to the *quality* of the leather, as a note payable in merchantable leather. I find no distinction made in the able essay of Chipman on this subject, nor in any of the books; but if there be a distinction, I apprehend it is the distinction alluded to by Chipman, pp, 33, 34, between articles of the lowest merchantable character and those of an average merchantable quality; the latter being the only proper tender on a note expressed for merchantable property, and the former on notes which are written indeterminately in respect to quality.

Leather sealed "B" is not bought and sold by merchants and dealers in leather; it is only the subject of rare and special contracts, which are exceptions to the common course of dealing and trade, when both parties trade with their eyes open, with a full knowledge that the article, which is the subject of negotiation, is a refuse article, condemned by the law and by all dealers and traders.

The opinion of the court was delivered by

BENNETT, J. Though this note was payable in sap buckets or leather, at the option of the maker, yet a day certain was fixed, when it was to become payable. By a fair construction of the note, whether paid in buckets, or in leather, it must have been paid by the middle of February next following the date of the note. When a note is payable in a specific article on demand, a special demand is necessary before suit is brought; but when a day certain is fixed for payment, a special demand has never been held necessary.

The defendant also objects to the charge of the court. If the

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leather tendered was not sealed, either at the time when it was turned out, or on the day when the note was payable, or if, when turned out, the leather was sealed with the letter B, the jury were told the tender could not avail the defendant. Is there any objection to this? By the act of 1797, if any person sold, or offered for sale, neat's leather, or calf-skin, or tanned horse's or colt's hides, until it was first sealed with the letter G, or with the letter B, he forfeited double the value of such leather, or hides, one half to the prosecutor and the other half to the treasurer of the town, in which the sale, or exposure for sale, happened. In 1811 the law was extended to tanners and persons engaged in the business of tanning, who should sell or expose to sale any sole-leather, until weighed and stamped. Slade's Comp. 468, 471. As this note was not only given, but payable, before the Revised Statutes went into operation, the rights of the parties are to be determined under the old law. It is said by the defendant's counsel, that, if there had been any tanned sheep skins, goat skins, dog skins, deer skins, or hog skins, which come under the denomination of leather, and which are not required to be stamped, among the leather turned out, the jury, under the charge, must have still returned a verdict for the plaintiff. But we are not to understand that such was the fact. The case shows that a quantity of leather of different descriptions was turned out by the defendant at his shop; and it is to be taken that this was all such leather, as the defendant was bound by the law to cause to be stamped, before he offered it for sale. It might well have been, and I have no doubt, from the manner in which the case was made up, it was so, in point of fact.

The whole question raised on the charge is, as to what should be the effect, either of the want of a stamp upon the leather, or if stamped *bad*. In all other respects the charge was satisfactory. Every proper intendment is to be made to sustain a verdict; and it is the duty of the excepting party to show affirmatively that error intervened on the trial. If the leather was not sealed, it was the object of the defendant to transfer the ownership of the leather from himself to the plaintiff, in payment of his note, against the express prohibition of the statute. Will the court, in such case, lend the party its aid to carry such intention into effect? The rule, as laid

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down by Chitty, is, that a contract is void, if prohibited by a statute, though the statute only inflicts a penalty; because such a penalty implies a prohibition. Chitty on Contracts, (last edit.) 694; *Bartlett v. Vinor*, Carth. 252. In *Langton v. Hughes*, 1 M. & S. 596, Lord Ellenborough says, "it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament cannot be made the subject matter of an action." *De Begnis v. Armistead*, 10 Bingh. 107; *Ferguson v. Norman*, 5 Bingh. N. C. 86; *Cope v. Rowlands*, 2 Mees. & Welsb. 149; *Wheeler v. Russell*, 17 Mass. 258; *Mitchell v. Smith*, 1 Binn. 118.

If, then, the defendant could not have recovered in an action for leather sold, in contravention of the statute, it follows, that the court should not give effect to a tender, the object of which was to pass the title to the leather from the one to the other, in payment of a precedent debt.

The alternative of the charge of the court, that, if the jury found the leather sealed with the letter B, it could not avail the defendant, cannot admit of a question. If the defendant elected to pay his note in leather, the plaintiff had the right to require that it should be of a merchantable quality. Such must be taken to have been the intention of the parties. This is well settled. If, then, the leather had been condemned by the leather-sealer, and stamped as bad, this would furnish evidence that the leather was not of such a quality as the defendant was bound to turn out, and could not operate to discharge the note.

The judgment of the county court is affirmed.



OTIS THOMPSON v. JOHN GILMAN.

When the jury, in an action of ejectment, have established the fact that the deed, under which the defendant claimed title, was fraudulent and void, and that the defendant was a party to the fraud, the defendant is not entitled, on a declaration for betterments, filed under the statute, to recover payment for the improvements which he has made upon the premises.

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In such case the defendant in the suit for betterments is entitled to prove, in that suit, by the record in the action of ejectment, that such was the finding of the jury.

And the plaintiff in the suit for betterments is not entitled, in that suit, to give in evidence any facts, which tend to show that such deed was not fraudulent,—that matter having become *res adjudicata* by the verdict in the former action.

Neither is he entitled to give in evidence any facts, which tend to show that the plaintiff in the action of ejectment had no title to the premises in question.

THIS was a declaration for betterments* based upon a previous recovery by the present defendant, in an action of ejectment in his favor against the present plaintiff† Plea, the general issue and trial by jury.

The plaintiff offered in evidence a deed from Moses Norris to himself, dated and acknowledged the 13th of March, 1830, and recorded the 14th of the same month, conveying all the lands which the said Norris owned in the second division of lands in Derby, in the county of Orleans, drawn to the original right of Josiah Strong, with all the privileges, &c.

The piece of land in question, which was included in said deed, contained about seven acres, and the said Thompson introduced evidence tending to show that said piece of land was not worth more than \$100 when he entered into possession under his deed,

*Under the statute of 1820, Slade's St. 182, extended by statute of 1834, Thomp. St. 38, and substantially re-enacted in Revised Statutes, p. 216. c. 35, § 15, in these words; "After final judgment, in an action of ejectment, in favor of the plaintiff, if the defendant has purchased the lands recovered in such action, or taken a lease thereof, or those under whom he holds have purchased a title to such land, or taken a lease thereof, supposing at the time of such purchase such title to be good in fee, or such lease to convey and secure the title and interest therein expressed, such defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such land, by such defendant, or those under whom he claims, in the manner hereinafter provided."

†See the report of that case,—*Gilman v. Thompson*, 11 Vt. 643.

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and that he had put on to it permanent improvements, which cost \$1000, and that said improvements were, at the time of trial, worth \$785.

The defendant then offered in evidence a transcript of records in the county and supreme courts in said county, showing that said land had been attached and set off on execution in his favor against the said Moses Norris and others, and that afterwards this defendant commenced his action of ejectment against the said Thompson, for the possession of the same; that the question submitted to the jury, on the trial of that case, was, whether the deed, now offered by this plaintiff, and under which he then claimed title, was fraudulent and void, as against creditors, or not; and that the jury, by their verdict, found that said deed was fraudulent, and that said Gilman should recover the seizin and possession of said land, notwithstanding the said attachment and levy were subsequent to the execution of said deed. To the admission of which record, as evidence, the said Thompson objected; but the objection was overruled, and the record admitted; to which admission he excepted.

The said Thompson then offered evidence tending to prove that the notes signed by the said Moses Norris and others, and on which the said attachment and levy were predicated, were not due until a year after he received his said deed; that David Norris, (son of Moses Norris) owed the said Thompson \$100, which claim the plaintiff transferred to Moses Norris in part payment for said land, and which claim the said Moses subsequently discharged; that said David Norris was bankrupt, and had absconded when said deed was executed; and that, previous to the execution of said deed, Norris endeavored to prevail on Gilman to take said land, in part or whole discharge of the demands upon which he afterwards attached the premises, but that Gilman then refused; to which evidence the defendant objected, and it was rejected by the court; to which the plaintiff also excepted.

E. Padlock for plaintiff.

The statute of frauds, under which Gilman obtained his judgment in the action of ejectment, though salutary in its effects in society, must unavoidably operate occasionally with great severity

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upon the purchaser; hence courts have directed jurors to examine "the motives of purchasers with care, and see whether the purpose and intent of the defendants were corrupt and fraudulent, their motive dishonest, and the object fraudulent,"—*Brooks v. Claves et al.*, 10 Vt. 42,—or whether the making a good bargain for themselves was the inducement to make the purchase; and if the latter, it was no breach of the statute.

I take it we are bound in this case, as in all others involving a penalty, to impute charitable motives for transactions, unless the contrary appears; and here circumstances are developed, which go to rebut the presumption that the object of Thompson's purchase was to prevent the collection of Gilman's debt. 1. He knew Gilman had refused the land. 2. By purchasing the land he secured and saved \$100, which the son of Moses Norris owed him, and which, otherwise, would have been lost. 3. Thompson immediately erected a mill on the premises, and we may well presume the intention of erecting a mill an inducement. 4. He would never have put so much property upon hazard, had he entertained a doubt as to the validity of his title. The question then returns, did Thompson *suppose*, at the time he took his deed, that his title was good in fee? We think there can be no rational doubt of it. 5. It is not presumable, that Thompson bought to defeat a debt not due under a year after.

But it is said that all claim to betterments is cut short by the finding of the jury. We admit that the jury wrongfully found the deed fraudulent in law, and we have paid the full penalty of the act, in the forfeiture of our land. 11 East 180. We ask not to have the former decision reversed, but, under favor of the statute, we ask to be protected in the earnings of our labor, since the execution of our deed; and this will do no injustice to Gilman, inasmuch as the law secures to him, ultimately, all that his land would have been worth to him without such improvements.

We need not be told that the record, pleaded in this case, destroys the deed, or its operation upon the title of the land, so far as it respects the creditors of Moses Norris, for such has been the decisions of our courts. But the deed was valid upon the face of it, and conveyed the land, if Norris had had no creditors, and was a

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perfect deed to every intent and purpose, and valid, when Thompson went into possession, and by it the absolute fee of the soil was in him, and he was thereby a freeholder, until the judgment came; and then sufficient for the day was the evil thereof. Though by the law his deed is dead, yet there is a redeeming spirit in the betterment act, under favor of which he now stands in court. *Gaige et al. v. Ladd*, 5 Vt. 268; *Brown v. Storm*, 4 Vt. 44.

Smalley & Adams for defendant.

1. The plaintiff, having taken a deed of the premises mentioned in his declaration from Norris, and gone into possession of the same under it, for the fraudulent purpose of defeating the rights of Norris' creditors, is not within the spirit of the act of 1820, in relation to betterments. If the deed, under which the plaintiff claimed title to the premises, and under which he entered, was made by Norris, and accepted by the plaintiff, for the fraudulent purpose of defeating the right of Norris' creditors, it is difficult to understand how it can be said that the plaintiff purchased, supposing that he had thereby acquired a valid title. In *Brown v. Storm*, 4 Vt. 42, the court, in commenting upon this statute, say, that it was made to give relief in those cases where a person has honestly and innocently entered into possession, supposing he had purchased a good title; and we are not aware that the principle there laid down has ever been doubted or denied.

2. The record of the recovery in the case of *Gilman v. Thompson*, and the grounds upon which the recovery was had, were properly admitted as evidence in this case. Indeed, without this species of evidence there could have been no foundation for the plaintiff's claim.

The opinion of the court was delivered by

HEBARD, J. The principal question in this case, and the one upon which the case must turn, is, whether the plaintiff, in legal contemplation, could take a fraudulent deed, and still, in the language of the statute, "suppose, at the time of such purchase, such title to be good in fee." The fact that the contract for the purchase

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of the land was fraudulent has been found by the jury, and that point cannot be farther litigated. It was the *very fact*, so the bill of exceptions finds, upon which the action of ejectment was made to depend. And this fraud, too, must have been of that affirmative character, that the plaintiff cannot plead ignorance of the facts, or of the consequences,—otherwise, the jury would not have been warranted in returning the verdict that they did. This point having been settled and established by the jury, it is difficult to understand how the plaintiff could have supposed that he had, at the time of the purchase, “a good title in fee,” when the very contract by which he attempted to hold the land, contained the seeds of its own dissolution.

The plaintiff complains that the court excluded certain facts that he offered to prove. The exceptions do not state the purpose for which those facts were offered, but it is to be presumed that the object was to satisfy the jury that he purchased the land in good faith, and without any intention of injuring any one. All that would have been very proper in the action of ejectment, and, if he had succeeded in satisfying the jury that he had no such fraudulent intent, that must of course have induced a different verdict, as that was the *very fact* in issue. But the jury have found the fact the other way, and it has become *res adjudicata*; and now to admit that proof and try the same question over again, between the same parties, would be contravening a well settled principle of law.

The plaintiff also objected to the admission of the record of the action of ejectment; but the introduction of that record was essential to his recovery; and without it I do not see how he could recover; for this proceeding for betterments cannot be sustained until after there shall have been rendered a final judgment in the action of ejectment; and the record in that action must be the only legal evidence.

The facts, then, which were offered by the plaintiff, had no other tendency than to show, that, in the purchase of said land, by the plaintiff from Norris, there was no fraud, and that, there being no fraud in that deed, the defendant is without title to the land. In *Brown v. Storm*, 4 Vt. 37, which was a declaration for betterments,

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in which there were several counts, the court say, "that no damage can be assessed upon those counts, which are founded on an alleged want of title in Storm." If damage cannot be assessed upon a count setting forth a want of title in the defendant, it would follow, that the plaintiff could not be permitted to introduce evidence to prove the same fact, when it was not alleged in the declaration. The bill of exceptions, in this case, refers to the bill of exceptions in the ejectment suit; and the exceptions in that suit state that Gilman introduced such evidence as enabled him to avoid Thompson's deed for fraud, and to recover a verdict; and upon this it is argued, that, for any thing that appears in that bill of exceptions, the proof showed the deed to Thompson to be a voluntary deed, given without consideration, and therefore void in law as to the creditors of Norris; and, that being the case, that it would not follow, necessarily, that Thompson was *particeps criminis* in the fraud, and, therefore, that this testimony should have been received. But this reasoning all vanishes when we look at the facts that he thus offered to prove. Among other facts, which Thompson offered, was the fact that he paid a full and adequate consideration for the deed, which in part consisted of a demand against David Norris. How much more he paid does not appear, but he gave evidence on the trial tending to prove that the land, when he bought it, was not worth over one hundred dollars. This, then, shows that Thompson considered that he was paying a full consideration for the land; and that being so, the deed could have been avoided for fraud, only upon showing that Thompson was a partaker of the fraud.

But it is said that it will be a great hardship for Thompson to lose these improvements and erections, which he put on this land in good faith. Whatever *hardship* a legal result in this case may work upon the plaintiff, we may equally regret with others, and would gladly relieve him, if in our power to do so without visiting a similar hardship upon the other party. It is a maxim of the law, that every man shall bear his own misfortunes, and suffer for his own faults. If, by his own fault, the plaintiff has so intermingled his own property with that of others, that it cannot be distinguished,

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and separated; it is either the fault or the misfortune of himself, and upon him the law visits the loss. The law gave the defendant the right to levy his execution upon this land thus fraudulently obtained. The law has made no provision for levying upon the land without the improvements, and by thus levying he has paid an equivalent for the whole land and improvements; and by compelling him to pay to the plaintiff the value of the improvements, we should be visiting upon him the same hardships that the plaintiff seeks to avoid. The same hardship might overtake a man who should become a fraudulent purchaser of personal property. The property, by keeping, might be very much increased in value, and still be liable to be attached and held by the creditor of the vendor, and the purchaser could have no remedy or relief for his expense in keeping the property.

A defendant in an action of ejectment, after final judgment against him, may, as a matter of statutory right, file his *declaration for betterments*; and, after the declaration is filed, it stands to be tried and determined by the law applicable to such cases. *Gaige et al. v. Ladd*, 5 Vt. 266.

Gilman had established his right to recover, by showing Thompson's deed to be fraudulent. And, upon the trial of the declaration for betterments, to try that question of fraud over again would be the same as to try the recovering party's title over again, when it depended upon other facts. The plaintiff in an action for betterments cannot proceed upon the ground of a want of title in the defendant. And, in this case, to allow the plaintiff to go into the showing that his deed was *not fraudulent* would be allowing him to dispute the correctness of the former recovery.

Judgment of the county court affirmed.

Smith v. Fisher.

BETSEY SMITH v. NOAH FISHER.

Where an appeal had been taken by the defendant from a justice's judgment, and the defendant neglected to enter the appeal in the county court, and the plaintiff entered the action for an affirmance of the judgment, it was held no cause for dismissing the action, that the defendant, more than twelve days before the term to which the appeal was taken, tendered a confession of judgment, under the statute, before the justice who rendered the original judgment, and that the justice, being then out of office, refused to accept the same.

THIS was an appeal, by the defendant, from the judgment of a justice of the peace, and the appellant neglected to enter the appeal, at the term to which it was taken. The plaintiff thereupon entered the action in court for an affirmance of the judgment, whereupon the defendant moved that the action be dismissed. Upon the hearing it appeared that the defendant, more than twelve days previous to the commencement of the present term, appeared before the justice who granted the appeal, and tendered a confession of judgment in favor of the plaintiff, for the amount of the original judgment, with interest and cost, according to the statute, and that said justice was not then in office, and declined to receive such confession for that reason. Upon these facts, the motion to dismiss was overruled and the judgment affirmed; to which decision the defendant excepted.

After argument by *T. P. Redfield*, for defendant, and *J. Cooper*, for plaintiff, the opinion of the court was delivered by

BENNETT, J. It is not necessary to decide what would have been the effect of the tender of the judgment to the justice, if he had remained in office, and had refused to enter it up. It is quite clear, in this case, that the tender of the confession can have no such effect as is claimed. The justice, when out of office, had no power to act in the matter; and, had he attempted to act, his proceedings would have had no force.

The judgment of the county court, in overruling the motion to dismiss, is affirmed.

Sisco v. Hurlburt.

HIRAM SISCO v. RUEL HURLBURT.

Where a motion to dismiss a suit, for want of any recognizance being taken, is filed in the county court, that court must take notice of whatever is shown by the writ itself; but if that court dismiss the suit, and the writ is not referred to in the bill of exceptions, this court will consider the question, whether there was any minute of recognizance upon the writ, as one of fact, and as decided by the county court.

A writ of *audita querela* is within the statute,—Rev. St. c. 28, § 5,—which requires a recognizance to be taken to the defendant for his costs, &c.; and a sufficient minute of such recognizance must appear upon the writ.

A minute of a recognizance, in which no sum is stated as the forfeiture, is of no binding force, and is not a compliance with the requirement of the statute.

AUDITA QUERELA. The defendant, in the county court, filed a motion to dismiss, because, as he alleged, the judge who allowed and signed the writ took no security by way of recognizance. There was a minute of recognizance upon the writ, signed by the judge, in these words;—"Ira Colburn, Charles A. Garland and Charles Sisco recognized to the defendant, conditioned for the 're-delivery of the said Hiram Sisco to the custody of the officer 'having the same, if the same shall be awarded, and for payment of 'all intervening damages, and in default thereof, the payment of 'debt, damages and costs."

The county court dismissed the action; to which decision the plaintiff excepted.

T. P. Redfield for plaintiff.

1. No minute of a recognizance on a writ of *audita querela* is required by statute, and none is necessary. *Foster v. Carpenter*, 11 Vt. 589; *Houghton v. Slack*, 10 Ib. 520; Rev. Stat. 222, § 8.

2. If such minute of recognizance was required by statute, this is sufficient. It conforms not only substantially, but literally, with the statute. It is an obligation of record to have the plaintiff's body removed to prison in case judgment be against him, and, in default thereof, to forfeit the original judgment and cost.

3. If the defendant wished to put in issue the validity of the

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recognizance, he should have pleaded it by some traversable plea. But a motion to dismiss must be founded on what is apparent of record, and this motion can only bring before the court the sufficiency of the *minute of recognizance on the writ*.

C. W. Prentiss for defendant.

The opinion of the court was delivered by

HEBARD, J. The defendant, in his motion, alleges that no recognizance was taken. If any was taken, it should appear from the writ. The writ was before the court, and they must take notice of whatever there was upon it. If there had been any recognizance taken, that would answer the requirements of the law; the plaintiff undoubtedly would have been at liberty to have replied that fact, and evidenced it in any proper manner. As he did not offer to do that, the court, having their attention called to the subject, must pass upon the question with such evidence as was presented, which was the writ itself. The writ is not shown us, nor made a part of the case by the exceptions; and whether there was *any recognizance* upon the writ was a question of fact, which the court below passed upon. The only question for this court to decide is, whether any recognizance is required by the statute.

The statute, Rev. St. chap. 28, sect. 5, provides that "no writ of summons, or attachment, requiring any person to appear and answer before any court in this state, shall be issued, unless there be sufficient security given to the defendant, by way of recognizance, by some person *other than the plaintiff*, to the satisfaction of the authority signing such writ, that the plaintiff shall prosecute his writ to effect, and shall answer all damages, if judgment be rendered against him; a minute of which recognizance, with the name of the surety, and the sum in which he is bound, shall be made upon the writ, at the time of signing the same," &c. "otherwise, the same, on motion, shall abate."

Here is a general provision and requirement, that applies to all writs. By the statute an *audita querela* may issue, either as a summons, or attachment, and must, of necessity, be embraced in the class of writs, in the provision of the statute just recited. In

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the chapter making provision for the writ of *audita querela*, it is required that there shall be sufficient recognizance to secure the re-delivery of the body, or estate, and the payment of intervening damages, &c. This, unquestionably, has reference to the previous provision, so far as the circumstances and manner of taking it is concerned. By taking *sufficient security*, we must be understood to mean, taking security which, in the *opinion* of the judge, is sufficient. The law relating to *audita querela* does not, in express terms, require that the person recognized shall be some person other than the plaintiff; but no one, I apprehend, would insist that a recognizance of the plaintiff himself would be a compliance with the law, even if the judge should consider him *sufficient*.

But there is an objection, more formidable than the fact of a variance in *form*, from the provisions of the statute. We regard this pretended recognizance as of no binding force, or effect, and as creating no liability on the part of the *recognizers*. This does not pretend to be a minute of a recognizance, stating the "name of the surety and the sum in which he is recognized." No sum is stated; of course there is no sum for which any judgment for debt, or damages, could be rendered against the recognizers.

The case of *Brown v. Stacy*, 9 Vt. 118, is referred to, for the purpose of showing that this is the correct mode of taking recognizance, the provision in the compiled statutes being the same as in the revised. But that case does not help the objection. All that case settles, upon that point, is, that the recognizance was taken with reference to the right section of the statute; but to the form and manner of taking the recognizance no objection was made. The complaint in that case was, "that there was no sufficient security to the defendant by way of recognizance for costs." In this case the difficulty is, that there is no security, by way of recognizance, for any thing, there being no sum named. The recognizance, without any sum named as the forfeiture, could have no binding effect. It would be as though none was taken.

The statute expressly requires a recognizance to be taken; and as none was taken in this case, as the statute requires, the county court committed no error in dismissing the suit.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF LAMOILLE.

APRIL TERM, 1843.

PRESENT.

HON. STEPHEN ROYCE,
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. WILLIAM HEBARD, }

GEORGE CARPENTER v. WM. P. SAWYER & CHARLES JEWETT.

Under the third section of the statute of 1807, relative to the sale of lands for non-payment of taxes, which required the town clerk to record, within a specified time after the sale, "the advertisements at length, and the title, the volume, the number and the date of the papers in which they were inserted," it was held that a record of such advertisements, made by the town clerk from the copy of the same, certified by him, in the sales book of the collector, was not a compliance with the statute, and that the collector's deed of land sold, when the record had been thus made, was of no effect to prove the title;—and it was held that the fact that the record was thus made might be shown by the parol evidence of the town clerk who made the record.

TRESPASS *quare clausum fregit*. Plea not guilty, and trial by jury.

The plaintiff claimed title to the premises in question, under a

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vendue deed to him from Luther Kidder, collector, dated June 6th, 1834, and, in support of said deed, offered in evidence an act of the legislature, passed October 31st, 1831, granting a road tax, of which tax said Kidder was collector, and an act passed November 3d, 1831, annexing part of Belvidere to Eden; also, said Kidder's sales-book, with the entries and certificate therein, and the record of the proceedings relating to said tax and vendue, as made in the book of records of said town of Eden.

The defendant then called William H. Isaacs, the town clerk who made said record, as a witness to prove the facts hereinafter detailed, as testified by him. The plaintiff objected to his competency as a witness, on the ground that his testimony tended to contradict, or invalidate, his records as town clerk; but the objection was overruled. He testified, that, at the date of his first entries and certificates appearing in said sales-book, said collector lodged said book in the town clerk's office, as a return, or account, of his sales and proceedings, together with all the newspapers containing the advertisements of the committee and collector; that the witness then compared the advertisements, as entered in said sales-book, with all the newspapers aforesaid, and made and signed the entries and certificates in said book, to which his signature appeared, of that date; that the newspapers were thereupon carried from the office by judge Chandler, and the witness had never seen them since; that the sales-book was also taken away by said Kidder, and retained for several days, but, within thirty days from the completion of the sales, was again lodged in his office by said Kidder, and the witness thereupon proceeded to make the record in the book of records, as the same now appears, and that said record was made by copying said sales-book, and the said entries and certificates of the witness appearing therein.

The court rejected the vendue deed, and a verdict was returned for the defendants. The plaintiff excepted.

After argument by *S. A. Willard*, for plaintiff, and *J. Sawyer*, for defendants, the opinion of the court was delivered by

BENNETT, J. The plaintiff claims title under what is called Kidder's vendue. At the last term of this court, in this county,

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in the case of *Istanc v. Chandler and others*,* in which was involved the validity of this same vendue, it was held, that parol evidence, of the character of that which was admitted in the county court, was admissible to invalidate the title claimed under the collector's sale. This, of course, settles the general question; but it is now insisted that this testimony cannot come from the town clerk himself, as it would tend to impeach his official conduct. As the testimony, in its character, is admissible, it is difficult to discover any rule of law, which will exclude the town clerk from being a witness. It is not claimed that he is incompetent on the ground of interest, and no authority is shown, that he should be excluded upon principles of policy. Whether the court would compel him to testify to facts tending to invalidate the *prima facie* effects of his record, is not now a question before the court.

It is a common case, in practice, to show by parol that a deed, filed for record, was not intended to be recorded until farther directions should be given;—and this too by the town clerk himself. See *Myers v. Brownell*, 2 Aik. 407. So, between other parties, an officer's return may be contradicted by parol evidence. Though the service may be held conclusive between the parties to the suit and their privies, yet I am not aware of any case giving it a conclusive effect against strangers. Judge Cowen, in his notes to Philip's Evidence, 1091, says, on the general principle that an officer cannot impeach his return in an action against himself, it has been said, he is not a competent witness for such a purpose, in other cases. The case of *Meredith v. Shewall*, 1 Penn. R. 496, is cited for the doctrine. How far that case sustains such a position, I am unable to say; but, from the manner of Judge Cowen's citing it, I should infer it was but the *obiter* opinion of a single judge. No authority, save that one, is cited by Judge Cowen; and he does not speak of such a doctrine as a settled principle, but is satisfied with saying, "it has been so said." No case has been cited at the bar, and I think such a principle would be an innovation upon the rules of evidence.

The next question is, what should be the effect of the parol

*Not reported.

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evidence, given in this case, upon the validity of the vendue? The statute requires the collector, within one year from the time fixed for the sale of the lands, to present to the town clerk a certificate of the oath by him taken, his warrant, and all the newspapers containing the advertisements, &c., and requires that these shall all be recorded, &c. See statute, Slade's Comp. 667. The statute that says the clerk shall record the advertisements at length, and the title, the volume, the number, and the date of the papers in which they were inserted, and the place where such paper was printed; and a copy of such record, certified by the clerk, is made full evidence of all such facts. The parol evidence shows that the clerk did not record the advertisements themselves, from the newspapers furnished him, which contained them, but made his records from copies furnished him upon the collector's sales-book. Is this a compliance with the statute? It is a principle of common law, that a copy of a certified copy of a record is not evidence. The reason is, that the more removed the copy offered in evidence is from the original, the greater is the liability to an inaccuracy. The objection would not be obviated, though each copy be examined and compared by the same individual. In the present case, the record is two removes from the original advertisements. The statute requires the clerk to record the advertisements themselves, from the newspapers. It cannot avail the party, that the town clerk had examined and compared the copies of the advertisements upon the collector's sales-book with the advertisements in the papers, and found them accurate, and that from these copies, he made the record; neither would it be of avail to show that the record of the town clerk, is in fact, a true transcript of the original advertisements. The statute is imperative in its terms, and we think, for obvious reasons, no other medium of making the record, than the one pointed out, should be resorted to.

There has not, then, been a compliance with the statute, in this respect. It is not denied, as I understand, that, if the requisitions of the statute have not been complied with, the effect must be to render a title under the vendue unavailing.

The courts have been, generally, somewhat astute in requiring a strict compliance with the statutes relative to the sales of lands, for

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the non-payment of taxes. See *Mead v. Mallett et al.* 1 D. Chip. 239; *Culver v. Hayden*, 1 Vt. 359; *Richardson v. Dorr*, 5 Vt. 16; *Spear v. Ditty*, 9 Vt. 283; *Sumner v. Sherman, et al.*, 13 Vt. 609.

The result is, the judgment of the county court must be affirmed.



KEELER & NOYES v. J. T. & H. C. MATHEWS.

In an action on book account against two defendants, where the plaintiff presented a charge for money lent, it was held that he might prove, by the defendant to whom the money was delivered, that the defendants were partners at the time the money was lent, and that it was obtained upon the credit, and for the use of, the firm.

BOOK ACCOUNT. The action came to the county court, by appeal, judgment to account was rendered, and an auditor appointed.

The auditor reported that the plaintiffs exhibited an account against the defendants for money lent, and that for the purpose of establishing joint liability of the defendants, for the same, he offered to prove by the testimony of one of them, H. C. Mathews, the following facts, namely,—that the defendants were partners, during the years 1839 and 1840, in carrying on a farm, and that they transacted business and drew orders in their company name, but only in connection with transactions relating to the farm; that, during said year 1840, the mother of the defendants, being sick, was visited by a physician, to whom they made promise of payment for his services; that for the purpose of paying the same, the said H. C. Mathews, at the request of said J. T. Mathews, borrowed of the plaintiffs the money in question, in the name of both, and gave direction to charge it to both, and that the same was paid in satisfaction and discharge of the balance of said physician's account. Objection was made to the testimony, on the ground that it was not competent to prove the alleged facts by the said defendant; but the objection was overruled by the auditor, and the said defendant was

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admitted to testify, and did testify, to the said alleged facts; whereupon the auditor reported that he found due from the defendants to the plaintiffs, the sum of \$6,75, submitted to the court, the question whether the witness had been properly admitted to testify.

The county court rendered judgment for the plaintiffs, upon the report; to which decision the defendants excepted.

J. Sawyer for defendants.

Could H. C. Mathews be admitted to show his own authority to borrow this money, and charge his co-defendant? It is contended that he ought to have been excluded. Admit the principle contended for by the plaintiffs, and what would be the effect? Any person might go forth, make a false representation, obtain goods to any amount, and, by swearing as a co-defendant, charge another, and, to that extent, shield himself. A party in a book action is not a general witness. 8 Vt. 400. He can be admitted to testify as to receiving the money, and various matters concerning it, but ought not to be placed in a situation where he must necessarily commit perjury, or convict himself of the offence of obtaining money under false pretences.

We contend that at least this comes under that class of cases where the witness if not, generally incompetent, is rendered incompetent by the nature of the particular question agitated at the trial. 3 Stark. Ev. 1729-30.

H. P. Smith for plaintiff.

The parties are competent witnesses in the book action. Revised Statutes, 220, sect. 6. Their examination must necessarily be general, and go to all the circumstances connected with accounts exhibited, and the liability of each to the other. They may testify to every material fact relative to their accounts proper to be considered in deciding upon the merits of the claims of the respective parties. *Stevens et al. v. Richards et al.*, 2 Aik. 81; *Fay et al. v. Green*, 2 Aik. 386; *May et al. v. Corlew*, 4 Vt. 12. Such is the rule laid down by this court in cases which have heretofore been before them; and in accordance with this rule, it has been decided that the parties may testify to a warranty and deceit in the

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sale and delivery of articles sold and charged on book,—to the loss and contents of a receipt, that the articles charged were not adjudicated in a former suit,—to the admissions of the other party,—to the delivery of a note in payment of an account,—to payments and settlements of accounts generally,—to the sale, price, delivery and value of articles, and the performance of services charged, and all the circumstances relative thereto. *Stevens et al. v. Richards et al.*; *Fay et al. v. Green* and *May et al. v. Corlew* above cited; *Warden v. Johnson*, 11 Vt. 456; *M'Laughlin v. Hill*, 6 Vt. 20; *Reed v. Talford*, 10 Vt. 568; *Fassett v. Vincent*, 8 Vt. 73; *Blish et al. v. Granger*, 6 Vt. 340.

The opinion of the court was delivered by

HEBARD, J. The facts offered to be proved were a proper subject of inquiry; and the only question is in relation to the person by whom they might be proved. The extent, to which parties to the action of book account, may be witnesses, has been a fruitful subject of inquiry. The particular question raised in this case has not, probably, been discussed and settled; but other questions very similar have been decided in repeated instances. The statute has made both parties witnesses, not only to facts which each may wish to establish for his own benefit, but, also, to facts which bear adversely. They are made witnesses to every fact, which relates to the original indebtedness. In this case there can be no doubt but what both of the defendants were competent witnesses to disprove the plaintiff's charge, to deny the reception of the money, and even to swear to the payment of it. Can it, then, be doubted that they are equally competent to testify to the contrary facts. We think this is not extending the book action beyond its present limits, nor are we able to see any objection to this, in principle. These are the very facts upon which the plaintiffs' right to recover depends. They are the very facts for which the statute has made the parties witnesses. In short we do not perceive any new principle involved in this question.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR.
FEBRUARY TERM, 1844.

[Continued from Vol. 16, page 700.]

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE,
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. WILLIAM HEBARD, }

LANDRUS WATERMAN v. DAVID HALL AND RICHARD LUTHER.

When, after an amendment has been permitted in the county court, the action has progressed to trial and judgment, it must appear beyond a doubt that the amendment was permitted contrary to law, to justify the supreme court in setting aside the subsequent proceedings for that cause.

In regard to injuries to the person, or to personal property, where the injury is directly inflicted by a forcible act, as where a blow is given to a person, or an act of violence is committed upon his breast, or other property, causing injury, the party aggrieved has generally no choice of actions and trespass is his only remedy; but if he have sustained a forcible injury, effected by means flowing from the act of the defendant, but not operating by the very force and impulse of that act, he may sustain either trespass or case.

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If the ultimate injury consists neither in the act of the defendant, nor in the continued physical impulse of that act, the plaintiff may, as he more frequently must, proceed in case.

In this case the injury alleged consisted in driving the plaintiff's beast upon a fence, whereby its death was caused, and it was held that either trespass, or case, would lie.

THIS action came into the county court by appeal. The original declaration, used before the justice of the peace who tried the case, was in these words; "In a plea of the case, For that whereas, on 'the sixth day of September, A. D. 1840, at Norwich, the said 'Landrus Waterman, plaintiff, was possessed of a certain bay mare, 'of the value of one hundred dollars, of the proper goods of him, 'the said Waterman, whereby he received benefit and profit; yet 'the said David Hall and Richard Luther, defendants, not ignorant 'of the premises, but maliciously intending and contriving to injure 'said Waterman, plaintiff, in this particular, then and there set 'upon said mare with stones and clubs, and chased and frightened 'the said mare, and drove the said mare upon a certain log fence, 'whereby the said mare was so wounded and injured, that her 'bowels were torn out, and of which wounds the said mare then 'and there died; by means whereof the said Waterman lost the 'benefit and profit of the said mare, and was thereby much injured."

At the second term after the action was entered in the county court, the plaintiff, on motion, was allowed to amend his declaration in these words; "And now the said Waterman comes into court, and, 'by leave of court, files his new declaration; whereupon he declares 'in a plea of the case, for that heretofore, to wit, on the sixth day 'of September, 1840, at Norwich, in said county of Windsor, the 'plaintiff was possessed of a certain bay mare, as of his own property, of the value of one hundred dollars; which said mare had then 'strayed into the field of the said defendant Hall, and then and 'there the defendants, in driving said mare out of said field, drove 'the said mare upon a certain log fence; whereby the said mare 'was so wounded and injured that her bowels were torn out, of 'which wound the said mare then and there died; by means where-

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' of the said plaintiff lost the use and benefit of said mare, and was ' thereby greatly injured."

To the decision of the court, in allowing this amendment, the defendants excepted. The jury returned a verdict for the plaintiff.

Tracy & Converse for defendants.

Had the court below authority to allow the plaintiff to substitute one declaration for the other? If, by such substitution the nature or form of action was changed, clearly they had no such power. *Carpenter v. Gookin*, 2 Vt. 495. That such was the effect, we think very apparent.

The new declaration is undeniably *case*. The original declaration is *trespass*; it wants nothing but the words *vi et armis*, and *contra pacem*, to make it in form, as well as in substance, *trespass*. These expressions are mere matter of form, not traversable, and their omission can only be taken advantage of by special demurrer. 1 Ch. Pl. 376. 1 Saund. R. 82, note (1.) *Higgins v. Haywood*, 5 Vt. 73.

The only criterion, by which to determine the character of this declaration, is to inquire whether the act complained of was done with force, expressed, or implied, and the injury immediate, or consequential. Testing it by this rule, it is clearly *trespass*. No excuse is given in the declaration for the intermeddling with the mare at all. The legitimate inference, then, is, that the defendants, "*maliciously contriving and intending to injure the plaintiff*," went into the plaintiff's field, and there destroyed the mare in the manner named. The act complained of is clearly represented as *forcible*, and the injury *direct* and *immediate*.

O. P. Chandler for plaintiff.

Both the original declaration and the amendment were in form *case*; unless, therefore, originally the *gravamen* of the declaration was necessarily in *trespass*, the amendment was proper. Though there be some expressions in the declaration inconsistent with the action, yet if the main scope and *gravamen* of the complaint is consistent with it, the other may be rejected by amendment.

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It is not *necessarily* implied by the declaration that the defendants struck, or hit, the mare with the stones and clubs; but if it were so, this not being the principal cause of complaint, such expressions may be rejected by amendment. The act is not alleged to have been done wilfully, or *vi et armis*, but *title* to property is set forth, *wrongful* injury, and *consequential* damage. The principal cause of complaint, from a fair construction of the whole declaration, is the chasing and frightening the mare, and driving her on to the fence; the injury was *directly* occasioned by the act of the mare herself, in jumping upon the fence, though this act was *consequent* upon the act of the defendants. 1 Ch. Pl. 127. *Turner v. Hawkins*, 1 B. & P. 476.

Again, when the injury complained of is occasioned by a direct application of force in a careless manner, either action will lie; the plaintiff may waive the force and declare in case. If, therefore, the general tenor of the declaration is not inconsistent with the intendment that the injury was occasioned by negligence, inasmuch as the plaintiff has brought case, it being a justice declaration, that intendment should be adopted. If so, it would be considered a proper action on the case, and the amendment, as it does not essentially vary the nature of the complaint, or change the *form* of action, was properly allowed. Oliver's Prec. 290. *Blin v. Campbell*, 18 Johns. 432. *McAllister v. Hammond*, 6 Cow. 342. *Hayward v. Bank of England*, 2 Burr. 1114. *Pit v. Gaince*, 1 Salk. 10.

The opinion of the court was delivered by

ROYCE, J. As the action progressed to a final trial and judgment after the amendment took place, it must appear beyond doubt that the amendment was permitted contrary to law, before we can be justified in vacating those subsequent proceedings for that cause.

We have to determine whether the original declaration must necessarily be regarded as a declaration in trespass, and not in trespass on the case. That the party intended to declare in case, and not in trespass, is sufficiently evident. He not only entitled his declaration "a plea of the case," but he commenced it by way of recital, (with a *quod cum*, as formerly styled,) which is admitted to be a decisive mark of distinction between the two forms of declaring.

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Ham. N. P. 10. He was also careful to allege a malicious motive in the defendants, which is not according to precedent in trespass, as the motive is not often essential to the right of action in that form. He did not insert the words—*with force and arms, or against the peace*; and although it be conceded that these have become but formal expressions, it is presumed they are never purposely omitted in a declaration designed to count in trespass. It is contended, however, that a forcible act of the defendants was alleged, and that the injury was immediate; and if this is the only admissible construction, it must follow that the declaration was substantially in trespass.

There is no doubt that the act of the defendants, as set forth, may properly be deemed a forcible act, and the question is, whether the injury must be referred to that act as its proximate and immediate cause. It is to be noticed that the injury complained of was not inflicted by the clubs or stones employed by the defendants, or directly by any act of force by them committed; so that, in effect, they were only charged with having by acts of force frightened and chased the mare, whereby she was induced to jump upon the fence to make her escape. Now in regard, at least, to injuries to the person and to personal property, I think the following rule may be sustained:—That where the injury is directly inflicted by a forcible act, as where a blow is given to a person, or an act of violence committed upon his beast, or other property, causing injury, the party aggrieved has generally no choice of actions, and trespass is his only remedy; but that the necessity of suing in trespass extends no farther, though the injury may have followed the forcible act without the intervention of any voluntary and responsible agency. In the latter case the party frequently has, as I consider, an election between the actions of trespass and case. I allude to the instance where he has sustained a forcible injury, effected by means flowing from the act of the defendant, but not operating by the very force and impulse of that act. He may then sue in trespass, constructively treating those means as attached to, and forming part of, the defendants, act, and thus bringing that act into immediate connexion with the injury; or, waiving all artificial views of the matter, he may adopt the other form of action, and treat the

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injury as consequential. Such a case, as well as that where the ultimate injury is not forcible, presents what are sometimes denominated the *causa causans* and the *causa causata*; as in the *Earl of Shrewsbury's Case*, 9 Co. 50. And whenever the latter cause (forming the point of the action as it usually does) consists neither in the act of the defendant, nor in the continued physical impulse of that act, I think the plaintiff *may*, as he more frequently *must*, proceed in case. Hence it has always appeared to me, that, though trespass was properly adjudged to lie in the celebrated case of the lighted squib, (*Scott v. Shepherd*, 3 Wils. 403) case would have been equally an appropriate remedy. The original declaration in this case appears to exhibit the two causes mentioned, in the act of the defendants with their clubs and stones, and in the consequent fright of the mare impelling her upon the fence. And the latter obviously formed the point of the action. I am therefore led to conclude, that the plaintiff was at liberty, upon the facts as stated, to declare in trespass on the case, and that his declaration was framed in that action. It follows that the amendment, as it neither varied the cause, nor changed the form, of action, was within the ordinary discretion and power of the county court, and is not the subject of revision here upon a bill of exceptions.

Judgment affirmed.



ORAMEL HUTCHINSON AND HENRY E. STOUGHTON v. JOEL LULL.

Where a creditor puts a writ of attachment against his debtor into the hands of a sheriff, and directs the sheriff to attach certain property as the property of the debtor, and tenders to him a suitable bond of indemnity for so doing, and the sheriff refuses to attach the property, the creditor cannot sustain an action against the sheriff for such refusal, if the property which the sheriff was directed to attach was in fact the property of a person other than the debtor.

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In such case the real owner of the property is a competent witness for the sheriff, in a suit brought against him by the creditor for such refusal.

In an action against a sheriff, for the default of his deputy, a release from the sheriff to the deputy of all liability on account of such default will render the deputy a competent witness for the sheriff; and, if the sheriff have received an indemnity from a third person for giving such release, a release from such third person to the deputy of all liability to him will render the deputy a competent witness for the sheriff.

TRESPASS ON THE CASE against the defendant, as sheriff of Windsor County, for the default of his deputy, Ephraim Ingraham, Jr., in not attaching certain property, which he was directed by the plaintiffs to attach, as the property of one John H. Leland, on a writ of attachment in their favor against said Leland. Plea, the general issue, and trial by jury.

On trial the plaintiffs gave evidence tending to prove that the said Leland had, for some time previous to the time in question, had possession of certain stage property, using it as his own; that, while it was thus in his possession, the defendant's deputy, Ingraham, attached the property, as Leland's, and took it into his possession; and that, while he thus retained it, the plaintiffs put into his hands a writ of attachment in their favor against Leland, and directed him to attach the same property thereon, as the property of Leland, and gave him a good and sufficient bond of indemnity for so doing; but that Ingraham refused to attach said property, and permitted the same to go out of his possession, whereby the plaintiffs lost the collection of their debt.

The defendant introduced evidence tending to prove that the property in question was, at that time, the sole property of one Aaron P. Leland, and that John H. Leland had no attachable interest therein, and, among other testimony to this point, offered the said Aaron P. Leland as a witness; the plaintiffs objected to his admission, but the objection was overruled by the court.

The defendant also offered the said Ingraham as a witness,—to whose admission the plaintiffs objected. The defendant then gave in evidence a release from himself to Ingraham of all liability on account of this suit, a writing of indemnity from Nathaniel Fuller-

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ton to the defendant for executing such release, and a release from Fullerton to Ingraham of all claim against him on account of having executed such indemnity. The court thereupon admitted said Ingraham as a witness.

The plaintiffs requested the court to instruct the jury, that, even if they were satisfied that John H. Leland had no attachable interest in the property at the time Ingraham was ordered to attach it, yet that the defendant was liable for the plaintiffs' whole debt, if Ingraham refused to attach the property after an indemnity, to which no objection was made, had been offered to him; and that, at all events, the plaintiffs were entitled to recover nominal damages.

The court refused so to instruct the jury, but did instruct them, that, if, at the time aforesaid, John H. Leland had no attachable interest in the property, they should return a verdict for the defendant.

A verdict was returned for the defendant. Exceptions by plaintiffs.

O. Hutchinson for plaintiffs.

1. We insist, that, on the evidence presented to the jury, they should have been instructed, as requested, to return a verdict for the plaintiff for the whole amount of his debt, which was lost by the deputy's neglect. Rev. St. p. 75, § 21, p. 239 §§ 3, 10. *Gardner v. Hosmer*, 6 Mass. 325. *Simmons v. Bradford*, 15 Mass. 82. *Heppel v. King*, 7 T. R. 370. *Orton v. Vincent*, Cowp. 71. *Bowen et al. v. Huntington*, 3 Conn. 423. *Ackley v. Chester*, 5 Day 221. *Watson v. Watson*, 9 Conn. 140. *Williams v. Lowndes*, 1 Hall 579. 8 Johns. 185. *King v. Baker et al.*, 1 H. Bl. 543. 2 Aik. 72. 1 Coxe's Rep. 277. *Hamilton v. Marsh*, 2 Tyl. 403.

2. The court below should, at least, have instructed the jury, as requested, on the question of *nominal damages*. *Marzetti v. Williams et al.*, 20 E. C. L. 412. *Bayliss v. Fisher*, Ib. 82. *Clarke v. Smith*, 10 Conn. 1. 10 Mass. 470. 2 T. R. 129. 3 Stark. Ev. 1341. 2 Wils. 414-422.

3. Ingraham was improperly admitted as a witness.

4. Aaron P. Leland was also improperly admitted as a witness. He, being the claimant of the property, must of course have been

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the plaintiff in a suit to try title to the property, had it been attached; and the issue in this case can be tried only on the same evidence which would have been legally admissible in that suit.

D. Kellogg and L. Adams for defendant.

The verdict in this cause has settled the fact that John H. Leland had no attachable interest in the property, at the time the defendant was requested to attach it on the plaintiff's writ against Leland; yet the plaintiffs contend that they are entitled to recover either the whole amount of their debt against Leland, or nominal damages. This ground, taken by the plaintiffs, cannot be sustained. *Cilley v. Jenness*, 2 N. H. Rep. 87. *Cooper v. Chitty*, 1 Burr. 20. *Crossley v. Arkwright*, 2 T. R. 604. *Fuller v. Holden*, 4 Mass. 498. 1 Swift's Dig. 590. *Alexander v. Macauley*, 4 T. R. 610. *State v. Miller*, 12 Vt. 442. *Sawyer v. Whittier*, 2 N. H. Rep. 315. *Ordway v. Bacon*, 14 Vt. 378. 8 Vt. 151. 4 Vt. 558.

The opinion of the court was delivered by

Roxce, J. The witness Ingraham was rendered competent, by the discharges produced at the trial. *Ordway v. Bacon*, 14 Vt. 378. And it is not perceived that any valid objection existed to the witness Leland. The officer saw fit to respect the claim of this witness to the property, and declined to attach it as the property of John H. Leland. The witness was therefore as free from all legal interest in the present controversy, as if no such attachment had ever been thought of.

The remaining question is, whether the officer was under a legal obligation, upon being tendered a sufficient indemnity, to proceed and attach the property as belonging to John H. Leland. That it may become the duty of an officer to levy upon or attach property in cases of doubtful ownership, is implied, if not expressly declared in the 3d and 10th sections of the act relating to the levy of executions. The former section directs the officer to levy on the goods and chattels of the debtor, "or such as shall be shown him by the creditor." And it is provided in the latter section, that, in cases of reasonable doubt as to the ownership of the property, or its liability to be taken, the officer may require an indemnity; and if that is not

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furnished in reasonable time, he may refuse to proceed, and may release the property; implying, that if the indemnity is furnished he ought to proceed. But the law cannot design to countenance the execution of process against one person, upon property actually and exclusively belonging to another. It is no less the object of the law to protect persons in general in the enjoyment of their property, than to subject that of a debtor to the process of his creditors. These statutory provisions are, therefore, only applicable to cases of honest doubt as to the true ownership. And even then, the creditor must have been able, upon the facts existing at the time, to defend the execution of the process, or he can have no remedy against the officer for refusing to execute it. In such a case the officer will refuse to act at his peril, but he cannot legally be required to commit a trespass. Now the charge requested of the judge would have involved an admission that John H. Leland had no attachable interest in the property, and yet have subjected the officer to damages for refusing to attach it as his. We think the judge would have manifestly erred in acceding to the request.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORANGE.

FEBRUARY TERM, 1844.

[Continued from Vol. 13, page 350.]

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE,
HON. MILO L. BENNETT, } **ASSISTANT JUDGES.**
HON. WILLIAM HEBARD, }

STEPHEN THOMAS v. THOMAS W. FREELON.

The pendency of another appropriate and prior action for the same cause, though it may be in a different court, is a proper and sufficient matter to be pleaded in abatement of the second suit; but it is essential that both suits be in favor of the same plaintiff.

Therefore where, to an action brought by the indorsee of a promissory note, the defendant pleaded in abatement the pendency of a prior action against him upon the same note, brought by the payee of the note, in his own name, while he was the owner of the note, and before any indorsement of it had been made, it was held that the plea was insufficient.

Thomas v. Freelon.

ASSUMPSIT upon a promissory note executed by the defendant, brought by the plaintiff as indorsee of the note, and which came to the county court by appeal.

The defendant pleaded in abatement, in substance, that, prior to the commencement of this action, the payees of the note, who then owned it, and before any transfer of it had been made, commenced an action against him upon the same note, before a justice of the peace, which action was pending against the defendant before the said justice at the time of the transfer of the note to the present plaintiff, and at the time of filing this plea. To this plea the plaintiff demurred specially. Various causes of demurrer, in respect to the form of the plea, were pointed out and insisted upon by the counsel for the plaintiff; but as no decision was made by the court in reference to them, it becomes unnecessary to detail them here.

The county court decided that the plea was insufficient; to which decision the defendant excepted.

H. Burton and *A. Howard, Jr.*, for defendant.

The plea alleges, that, at the time of the praying out and the service of this writ, a prior action was pending on the same note, in the name of the payees and assignors of said note against this defendant. We contend, that the law will not permit a number of actions to be pending against the maker of a note in the name of the payee and assignee at the same time. If it is said but one judgment can be recovered on the note, and the defendant can plead in bar to the other actions, the same may be said in all cases, when the action is between the same parties. When the statute gives a *qui tam* action, to recover a penalty, or forfeiture, to a common informer, which is regularly pending, a subsequent prosecution, to recover the same forfeiture, shall abate. *Morton v. Webb*, 7 Vt. 123. Ham. N. P. 96. *Commonwealth v. Churchill*, 5 Mass. 174. *Commonwealth v. Cheney*, 6 Mass. 349. *Commonwealth v. Howard*, 13 Mass. 221. 1 Bac. Abr. 13, 14. Gould's Pl. 283—287.

It appears by the pleadings, that the payee, at the commencement of the first action, was the owner of the note, and that the assignment was not made until after the first action was entered in court.

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The plaintiff, by the assignment, took all the interest in the first action, and could have prosecuted it to judgment, and the payee could not discharge it. It was an abuse of legal process in the plaintiff, to harrass and vex the defendant with this action. *Lampson v. Fletcher*, 1 Vt 168. *Strong v. Strong*, 2 Aik. 373. *Newell v. Adams*, 1 D. Ch. 346. *Parker v. Kendall*, 3 Vt. 540. *Cummings et al. v. Fullam*, 13 Vt. 434. *Sherwood v. Francis*, 11 Vt. 204.

Parker for plaintiff.

The identity of the parties in the two suits is not alleged; but the plea shows that they are not the same. 5 Dane's Abr. 712, Art. 11, sect. 1.

The opinion of the court was delivered by

ROYCE, J. Pleas in abatement are not designed to try a question of title to the thing sought to be recovered, but merely to test the form and regularity of proceeding. It is even said, that, for the time being, they impliedly admit the plaintiff's cause of action. 1 Sw. Dig. 606. And for the reason, that, in general, their object is not to contest the right alleged, but to embarrass and delay the trial of it, they are construed strictly, and no intendments are made in their favor.

The pendency of another appropriate and prior action for the same cause, though it may be in a different court, is a proper and sufficient matter to be pleaded in abatement of the second suit. And if there is no priority in the impetration, or service, of the respective writs, it has been holden that the pendency of each suit may be pleaded in abatement of the other. But the ground, on which pleas of this sort are allowed, is not so much the danger of two recoveries for the same cause of action, as the apparent vexation and oppression of instituting two suits, when one would answer every just purpose. To sustain such a plea it is therefore essential, not only that the cause of action be the same in both suits, but that they be in favor of the same plaintiff. As it is no plea that another action for the same cause is pending against a stranger, [Hob. 137,] so neither is it sufficient that such an action is pending in favor of another party. Saund. Pl. & Ev. 119, and cases there cited. And

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to this effect are all the precedents. Saund., as above cited, 2 Chit. Pl. 467, 2 Sw. Dig. 585, 1 Lil. Ent. 2 & 3. The two actions in this instance were in favor of different plaintiffs, each claiming, for aught that appears, in his own right; and it was quite beyond the legitimate scope of a plea in abatement, to determine which plaintiff had the better title. As this is a sufficient ground for adjudging the plea bad, we have no occasion to examine the other causes of demurrer which are assigned.

Judgment of county court affirmed.



TOWN OF BRAINTREE v. TOWN OF WESTFORD, Appellants.

The decision in *Stratford v. Hartland*, 2 Vt. 565, has the same force and authority under the Revised Statutes, that it possessed under the statutes under which the decision was made.

Under the Revised Statutes the appeal from an order of removal of a pauper must be taken to the term of the county court next succeeding the time when notice of the order is given to the defendant town, as required by the statute; and if not so taken, the settlement of the pauper becomes conclusively fixed by the order.

An appeal from a warrant of removal of a pauper cannot be allowed, when the order, upon which the warrant issued, has been acquiesced in, by neglecting to enter an appeal from it at the term required by statute, and it has thus become no longer open to litigation.

APPEAL from a warrant for the removal of certain paupers.

The appeal was taken to the December Term, 1842, of Orange county court, and at that term the plaintiffs appeared, and moved to dismiss the appeal, assigning, as cause, that the *order of removal*, in the case, was made on the 12th day of May, 1842, and that a true copy of the order, certified and attested by the justices making the same, was left with the then overseer of the poor of said town of Westford "within thirty days next after the making of the order, to wit, on the 30th day of May, 1842, and long before a term of

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this court holden at Chelsea, within and for the county of Orange, on the third Tuesday of June, 1842, to which term of said court an appeal in this case might and should have been taken, as said pauper was not removed under said order until the 11th day of June, 1842." To this motion the defendants demurred. The county court dismissed the appeal; to which decision the defendants excepted.

L. B. Vilas for defendants.

If this court sustain the decision of the county court, they must, in direct terms, repeal the statute. Rev. Statute, page 103, § 8. The statute allows an appeal from the warrant, as much as from the order. The court might as well deny the one as the other. The defendants, in this case, were not aggrieved by the order, but by the warrant.

But we contend that the appeal was in season for the order and warrant. The case of *Strafford v. Hartland*, 2 Vt. 565, was decided under the statute of 1817. The court say, that, under the statute of 1797, the appeal should be taken to the next term *after the actual removal*; the Revised Statutes are in the precise words of the statute of 1797, and do not contain the words "next after notice," which are found in the statute of 1817. Hence we say that this case is an authority against the decision of the County Court, instead of being in its favor.

J. P. Kidder for plaintiffs.

The order having been served in May, the appeal should have been taken to the June Term of 1842;—and it having been neglected until the Dec. Term of the same year, the court did not err in dismissing the appeal. Rev. St., ch. 16, § 8. The fixing the pauper on the defendants by an order of removal and notice is a sufficient grievance to entitle them to an appeal. *Strafford v. Hartland*, 2 Vt. 565, and cases there cited. The same phraseology, "order, or warrant, of removal," in the repealed statute, under which the decision in *Strafford v. Hartland*, was made (Sl. Stat. 371, § 6,) is in the Revised Statute, which governs this case.

Braintree v. Westford.

The opinion of the court was delivered by

ROYCE, J. The question now presented is the same which was decided in *Strafford v. Hartland*, 2 Vt. 565. That case must, consequently, govern the present, unless the question has since become affected by a change of statutes.

Prior to the act of 1817 it was not contemplated that an appeal would be taken until after an actual removal of the pauper, as no means were then provided for giving notice to the defendant town, except by executing the warrant of removal. Accordingly the act of 1797, in authorising an appeal "to the county court, next to be holden" &c., was always understood to mean the term of the court next after the removal was actually made. The additional act of 1817 directed that all appeals from orders of removal should be taken to the Supreme court, and to the term thereof to be holden in the same county "next after notice of said order shall be given to the adverse party." It was also required, by a subsequent section of the act, that an attested copy of the order of removal should be left with some overseer of the town, to which the removal was ordered, within thirty days after the making of such order. By the judiciary act of 1824 the county courts were again invested with appellate jurisdiction in all pauper cases. The case then arose, which has been referred to. The facts were precisely similar to those in the present case, and it was decided, upon full argument and consideration, that the appeal could not be sustained.

It will be borne in mind that the act of 1817 spoke only of an appeal from the order of removal; so that, had the right existed to appeal from the warrant of removal alone, that right was not affected by the act, and such an appeal might still have been taken to the county court. And the same right must have continued, after the entire appellate jurisdiction was restored to the county courts by the act of 1824. But all this is fully denied in the case cited, by which it was settled, that, as the statutes then stood, the settlement of the pauper was conclusively fixed by the order of removal, when that had been notified to the defendant town according to the statute, and no appeal had been taken as therein limited; and that no right was given to appeal from the warrant of removal, after the order had thus become final and unalterable.

Braintree v. Westford.

That determination was manifestly in accordance with principle and analogy. The legitimate purpose of an appeal is to revise some decision of the inferior tribunal, and not merely to correct abuses in the execution of their sentence, or judgment. It is true, that, when the appeal has been taken in season to try the validity of the order, such subsequent irregularities have been examined upon a motion to quash, as in *Barnet v. Concord*, 4 Vt. 564. But this does not prove that they ever constitute, of themselves, a sufficient ground of appeal. It is otherwise with those which precede the order, since they tend to impeach its validity.

Such being the settled construction under the former statutes, it is clear that no change has been effected by the late Revision. The 8th section of the present statute enacts, like that of 1797, "That, if any overseer shall think himself aggrieved by any order, or warrant, of removal, he may appeal therefrom," &c. And the 11th section requires a copy of the order to be left, as directed by the act of 1817. The term of the court, to which the appeal must be taken, is at present only designated, as in the act of 1797, by the word "next," which is not made expressly to refer to the time of giving notice of the order, as it was by the act of 1817. But since we are neither to treat the requirement in the 11th section as useless and nugatory, nor to suppose that two opportunities for taking an appeal in the same case were intended to be given, the word "next" must here be understood with the same reference which was expressed in the act of 1817. The decision in *Strafford v. Hartland*, has, therefore, the same force and authority under the present statute, that it possessed under those which were superseded by it. The conclusion is, that the appeal in this instance, being from the warrant of removal, when the previous order was no longer open to litigation, was unauthorised by law, and was properly dismissed.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CHITTENDEN.
JANUARY TERM, 1845.

PRESENT.

HON. STEPHEN ROYCE,
HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. WILLIAM HEBARD, } **ASSISTANT JUDGES.**

STATE v. JOHN BUTLER.

The omission by the clerk of the court to enter upon an indictment the minute required by statute of the "true day, month and year when the same was exhibited" is matter of abatement only, and, unless taken advantage of by the respondent before the plea of the general issue, must be considered as waived.

And *it would seem* that such minute would be sufficient, if made by the clerk, under the direction of the court, at any time during the term at which the indictment is exhibited.

An indictment, charging one as accessory after the fact, under the 11th section of chapter 102 of the Revised Statutes, must allege that the respondent did not stand in any of those relations to the principal offender, which are excepted from the operation of the statute in the enacting clause.

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But, *Per* REDFIELD, J., if the matter of exception be contained in a separate section of the statute, or in a proviso, or exception, distinct from the enacting clause, the fact that the respondent is within the exception is matter of defence merely, and the contrary need not be alleged in the indictment.

Under the Revised Statutes of this state the principal offender and the accessory may be indicted together; but *quære*, whether it is competent to charge one as accessory, both *before* and *after* the fact, in the same indictment with the principal, and in the same count.

But in this case that portion of the indictment, which attempted to charge the accessory with being such *after the fact*, being defective, was treated as surplusage, and the indictment treated as one against the principal and an accessory *before the fact*, and therefore sufficient.

INDICTMENT for being accessory to the stealing of a quantity of wool.

The indictment, in the form of three distinct counts, each having a formal commencement and conclusion, alleged, first, that Joseph King and Nelson Butler feloniously stole, took, and carried away one hundred pounds of wool,—secondly, that the respondent, “before the aforesaid one hundred pounds of wool was feloniously ‘stolen, taken and carried away by the said Joseph King and Nelson Butler, as aforesaid, with force and arms, &c., did *counsel*, ‘*hire and procure* the said Joseph King and Nelson Butler feloniously to steal, take and carry away the aforesaid one hundred ‘pounds of wool,”—and thirdly, that the respondent, “after the ‘aforesaid one hundred pounds was feloniously stolen, taken and ‘carried away by the said Joseph King and Nelson Butler, as aforesaid, with force and arms, &c., feloniously did harbor, conceal, ‘maintain and assist the said Joseph King and Nelson Butler, he, ‘the said John Butler then and there knowing that the said John ‘King and Nelson Butler had, on &c., feloniously stolen, taken ‘and carried away the aforesaid one hundred pounds of wool, as ‘aforesaid, &c., with intent that the said John King and Nelson ‘Butler should escape and avoid detection, arrest, trial and punishment, contrary” &c. The indictment also alleged the same facts, in precisely the same form, in reference to the stealing of one hundred and seventy pounds of wool.

At the term at which the indictment was presented, and after

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the respondent had been arraigned and had pleaded not guilty, and after the jury had been impannelled and sworn to try the case, but before any evidence had been given to the jury, the respondent moved the court to dismiss the indictment, assigning as cause that no minute had been made upon the indictment, by the clerk, of the true day, month and year when the indictment was exhibited to the court. Whereupon the clerk, by the permission of the court, and while the motion to dismiss was pending made a minute, in the form required by statute, and the court thereupon overruled the motion to dismiss, and directed the trial to proceed.

After a verdict of guilty had been returned, and before sentence, the respondent filed a motion in arrest, for the insufficiency of the indictment,—which motion the court also overruled. Exceptions by respondent.

D. A. Smalley and C. D. Kasson for respondent.

1. The two counts, charging the respondent as an accessory after the fact, are bad. Sect. 11 of chap. 102 of the Revised Statutes, under which these counts are framed, expressly excepts from its operation "all persons standing in the relation of parent, or child, brother," &c., to the principal. The count should allege that the respondent is such a person as *can* commit the crime. It is well settled, that, where the exemption is made in a statute by way of *exception*, and not by a *proviso*, that the pleading must allege that it is not one of the excepted cases; whereas in the case of a proviso that need not be alleged, but the party must take advantage of it in his defence. *Rex v. Jukes*, 8 T. R. 544; 2 Hawk. C. P., c. 25, sect. 113. Chit. Cr. Law 204-5.

2. The indictment is multifarious, both as to parties and crimes. King and Nelson Butler are charged with larceny in distinct, independent, counts, upon which they may be arraigned and convicted independent of John Butler. Then John Butler is charged, in distinct and independent counts, with still a different and substantive offence. As to the proper form of indictment in such a case, see Arch. Cr. Pl. & Ev. 444 *et seq.* Chit. Cr. Law 224-5.

3. The counts charge no offence to have been committed by the *principal*. There are six counts, each having a proper begin-

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ning and conclusion. If we lay out of the case the two counts distinct as to the principals, it leaves no charge of an offence as to them in the counts against John Butler. Chit. Cr. Law 204-5, 224-5, 272-4. Nor are there any sufficient allegations in the other four counts to make the two counts against the principals a part of the other four counts. The only words used, having any allusion to the first two counts, are "*as aforesaid.*" But this, we suppose, it is well settled, can only refer to what is said before in the *same count*, and, unless some other phrase is used, matter in one count cannot be adopted into another.

4. The motion to dismiss ought to have been sustained. Rev. St., c. 58, §§ 8, 10.

Israel P. Richardson, state's attorney.

1. The motion to dismiss the prosecution is in the nature of a dilatory plea, and should have been pleaded before the general issue;—the rules of pleading are to be observed as much in criminal cases as in civil actions. The statute of 1797, upon this subject, declared the proceeding to be *void*, when a minute of the day, month and year was not made on the bill, &c. This continued to be the law until the revision of the statute in 1839. But even under the law of 1797 the accused could waive any such defect, if he pleased; and if he did so by an express waiver on the record, or by an implied one of going to trial and suffering a conviction and judgment, it was always supposed that the objection came too late after sentence, though the statute declared the whole to be void.

2. The making of the minute by the clerk is a ministerial act, and may be done at any time; and in this case it was done,—which was a substantial compliance with the statute. 1 Chit. Cr. Law 274, 614, note Y. 1 Saund. R. 249. 1 Str. 136.

3. As to the motion in arrest;—The principal and accessory may be joined in the same indictment; and be put on trial at the same time. Rev. St. c. 102, § 9. 2 Hawk. P. C. 456, § 47, and notes. 2 Ib. 323. The precedents are, that there is one count for each several offence against the principal, and also against the accessory, in the same indictment. See 2 Chit. Cr. Law 6, and 1 Ib. 224.

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The opinion of the court was delivered by

REDFIELD, J. The motion to dismiss was correctly overruled for two reasons. 1. The statute provides, in terms, that, if the proper minute shall not be made, the proceeding: "shall, on motion, be dismissed;"—not that it shall be void, but shall, on motion, be dismissed,—thus making it matter of abatement, except as to the form of raising the question, which need not be by formal plea, but may be by motion. But it does, in other respects, partake of the nature of a plea in abatement, and, unless pleaded before the plea of the general issue, must be considered as waived. Such was the decision of this court in regard to the minute upon writs sued out to recover penalties, which is provided for in the very same section, and with precisely the same words, as in case of an indictment. 2. We do not perceive but there must be some time allowed for the making of this minute,—and we are not prepared, at this time to say that this court could adjudge this minute so informal as to time, as to be of no validity. But it is not necessary to spend much time upon this point.

In regard to the sufficiency of the indictment, the counts, which charge the respondent as accessory after the fact, cannot be maintained. This must be considered an indictment under the statute. As the statute has modified the common law offence, it must be considered as, thus far at least, having superseded it. And viewed as an indictment under the statute alone, it is impossible to sustain it. For the statute, in the body of the enacting clause, provides that the persons to be guilty of the offence shall not stand in certain specified relations to the principal offender,—that is, "Every person not standing in the relation of husband and wife, parent, or grand parent, child, or grand child, brother, or sister, to an offender." It is not *every person*, but only those not standing in these relations; so that the quality is as necessary to be alleged in the indictment, as if the persons had been required to be of a good age, in order to be guilty of the offence; and in such cases the allegation of the *quality*, required in the person to commit the offence, must always be found in the indictment.

Where the exception is in a separate section of the statute, or in a proviso, or exception distinct from the enacting clause, it has al-

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ways been esteemed matter of defence, and that it need not be alleged in the indictment; but if the exception was contained in the body of the enacting clause, it was in the nature of a condition precedent and must be alleged in pleading. Arch. Cr. Pl. 29. *Spiers v. Parker*, 1 T. R. 137. *The King v. Pratten*, 6 T. R. 559. *The King v. Stone*, 1 East 639. *The King v. Earnshaw*, 15 East 456. In the case of *The King v. Stone*, the court seem to have been equally divided upon the question whether it is incumbent upon the prosecutor to *prove such negative exception*. But, upon general principles, it would seem to be as necessary to give some proof of the exception, whether affirmative, or negative, as to *allege* it. And one can hardly forbear a smile at the simplicity of Mr. Justice LE BLANC, in the last case, who, (when pushed by the argument of Lord KENYON of the absurdity of requiring the *allegation* and dispensing with the *proof*,) supposes the allegation might be of *some* service to the defendant, in apprizing him of what "*proof he must come prepared with*" in order to make his defence available. The rule, as laid down in *Rex v. Rogers*, 2 Campb. 654, seems to require the proof to support the allegation.

The remaining question raised, in regard to the sufficiency of the counts charging the respondent as accessory before the fact, it is difficult to determine satisfactorily. If these counts are to be considered as charging the principals and accessories all together, it may be well enough; but it seems questionable whether the precedents will justify charging the principal and accessories both *before* and *after* the fact in the *same count*. This seems to *me* to be an indictment in *two counts*, in each of which the principals are charged in due form, and then the respondent is first charged as accessory before the fact, and then as accessory after the fact.* I cannot say that, in principle, there is any very great objection to this course; but in practice, I apprehend, it has not been usual to do more than to indict the principal and the accessory either before

*The counsel on the part of the state, even, do not agree in regard to the number of counts,—one calling it two counts, and the other four, while the counsel for the respondent call it an indictment in *six counts*. REDFIELD, J.

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or after the fact in the same count,—and generally, not more than this is found in one indictment.

But, at all events, as the attempt to charge the respondent as accessory after the fact is defective, as we have seen, for another reason, it may be rejected as surplusage, and the indictment will then stand good against the principals and the respondent, as accessory before the fact,—which is the most common mode of indictment, in such case at common law. In this state, by statute, the accessory, either before or after the fact, may be indicted, convicted and punished “either with the principal offender, or after his conviction,” (which was the case at common law,) “or he may be prosecuted and convicted of a substantive offence, whether the principal offender shall or shall not have been convicted,” &c.

The respondent’s bonds being called out, no formal judgment was entered upon the record.



STATE v. JONATHAN WILKINS.

The expression, in an indictment for passing a counterfeit bank bill, that the bill “was made in imitation of, and did then and there purport to be, a bank note, for the sum of five dollars, issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the Legislature of the State of Maine, one of the United States of America,” is a sufficient averment of the existence of such bank, and that it is an incorporated institution.

The words “bank bill” and “promissory note,” in the fourth section of the statute,—Rev. St. c. 96, § 4,—which provides against the offence of passing counterfeit bank bills, are synonymous; so the words “bank note” have the same signification; and an indictment, which charges a respondent with having uttered a counterfeit “bank note,” is sufficient, within that section.

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Under the fourth section of chapter 96 of the Revised Statutes, the *uttering*, *passing* and *giving in payment* a counterfeit bank bill are distinct offences; and an indictment for *uttering* and *passing* such bill, averring the knowledge of the respondent that the bill was counterfeit, is sufficient, though it do not allege that the respondent uttered and passed it as a true bill.

The allegation, in an indictment for passing a counterfeit bank bill, that the bill passed "was made in imitation of, and did then and there purport to be, a bank note for the sum of five dollars, issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the Legislature of the State of Maine," is merely an allegation that the bill was fictitious, and is not an attempt to set forth the bill according to its legal effect and *purport*, in such way as to lay the foundation for a variance between the allegation and the *terms* of the bill.

It is discretionary with the Supreme Court, after they have adjudged an indictment sufficient upon demurrer, to allow the respondent to plead anew, and remand the case to the county court for trial, or not.

INDICTMENT in four counts, the first and third of which were for uttering, passing and giving in payment counterfeit bank bills, and the second and fourth for having in possession such bank bills with intent to pass them.

The first count alleged that the respondent "wittingly, deceitfully and unlawfully did utter, pass and give in payment to one Elisha W. Fairbanks, of Mendon in the State of Vermont, one certain false, forged and counterfeited bank note, which said note was made in imitation of, and did then and there purport to be, a bank note for the sum of five dollars, issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the Legislature of the State of Maine, one of the United States of America, made payable to S. Beare, or bearer, on demand, numbered two hundred and seventy four, and dated the first day of September in the year of our Lord one thousand eight hundred and thirty five, with the name of S. E. Crocker thereto subscribed as President of said bank, and the name of C. C. Tobie countersigned thereon as Cashier of said bank, and was in the words and figures following, that is to say,

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"The State No. 274 of Maine.

"The President, Directors and Company of the Bank of Cumberland promise to pay Five Dollars to S. Beate, or bearer, on demand.

Portland, 1st Sept. 1835.

"C. C. Tobie, Cash'r.

S. E. Crocker, Pres't."

'He, the said Wilkins, then and there well knowing the said note to be false, forged and counterfeited, as aforesaid, with intent to defraud the said Elisha W. Fairbanks, contrary," &c. Those parts of the other counts on which any question arose were substantially the same with the count above set forth.

The respondent demurred to the indictment, and the county court adjudged the indictment sufficient; to which decision the respondent excepted.

Hyde & Peck for respondent.

To bring the offence within the statute, all the facts must be directly and positively alleged, which constitute the crime, and which it would be necessary to prove.

1. There is no allegation of the existence of the bank. The averment, that the note "*did then and there purport to be a bank note for the sum of five dollars, issued by the President, Directors and Company of the bank of Cumberland, by and under the authority of the legislature of the State of Maine,*" is an allegation of the purport of the bill, and not of the *actual existence*, or incorporation, of the bank by or under such authority. If the averment will bear the other construction, it is bad, as the existence of the bank is there alleged only by way of recital. Passing bills upon a fictitious bank, having no existence, might be a misdemeanor, but not within the statute; hence proof of the existence of the bank is always given on trial. As the incorporation of a bank is not a public but a private act, it must be pleaded and proved,—and most clearly in case of a bank under a foreign jurisdiction.

2. If, upon general principles, the existence of the bank need not be alleged, yet the indictment is bad. The statute (ch. 96, §§ 3 and 4, p. 434) extends only to banks "*incorporated by the Congress of the United States, or by the legislature of any state or*

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'territory of the United States.' The court cannot take judicial notice that the Cumberland Bank was *incorporated by such authority*; hence it should have been averred.

3. It is not alleged that the bill was passed *as true*. The very essence of the crime is the passing a false, or forged, instrument as genuine, or giving in payment the *false as true*. This defect is not cured by the words "*wittingly*," "*wilfully*," "*and with intent to defraud*." "*Wittingly* signifies knowingly, unlawfully, without authority; and as to the words *deceitfully* and *with the intent to defraud*, the deceit, or fraud, might consist in something other than passing the instrument as true. These general words in pleading are inoperative, except to show an intent, which must be based on facts previously alleged.

4. The purport and tenor of the instrument, as alleged, do not agree. It is alleged that the bill purports to be issued by and under the authority of the legislature of the State of Maine. The words—"The State of Maine," in the tenor, indicate only the place of execution, and imply no authority from the State of Maine. This defect is fatal.

5. The crime created by the statute is the uttering, passing, or giving in payment, any "*bank bill or promissory note*;" the indictment is for uttering and giving in payment a "*bank note*." The words of the statute in the description of the subject matter must be followed. 1 Hale 220. *Rez v. Davis*, Leach 55. *Rez v. Turner*, 1 Mood. C. C. 239. *Rez v. Compton*, 7 C. & P. 139, [32 E. C. L. 469.] 2 East P. C. 601-2.

Israel P. Richardson, state's attorney.

The opinion of the court was delivered by

BENNETT, J. The county court, upon a demurrer to this indictment, held it sufficient; and the case comes before this court upon exceptions to such decision.

The demurrant insists, that the indictment is bad for sundry reasons. It is said, that there is no allegation in it of the existence of the bank. If this was so, the objection would have been well taken. The allegation is, that the respondent did pass, &c., one

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certain false, forged and counterfeit *bank note*, which said note was made in imitation of, and *did purport* to be, a *bank note*, issued by the President, Directors & Co. of the Bank of Cumberland by and under the authority of the Legislature of the State of Maine, one of the United States of America. The statute of 1818, Stade's Ed. 261, provides, that, if any person shall counterfeit, &c., any *bill*, or *note*, issued by the President, Directors & Co. of the Bank of the United States, or by the Directors of any other bank, *by or under* the legislature of any of the United States of America, he shall, on conviction, be confined, &c. In the Revised Statutes, p. 434, the form of the expression is somewhat changed, and prohibits the counterfeiting any *bank bill* or *promissory note*, issued by any banking company, *incorporated* by the Congress of the United States, or by the legislature of any State or Territory of the United States. No doubt, under the Revised Statutes, the Bank must be an incorporated institution, and it must, in substance, be so alleged in the indictment. So I conceive, that, under the statute of 1818, the bill must have been counterfeited upon an incorporated institution, and that the Revised Statutes were not designed to introduce any new rule. The expressions, a *Bank note*, or *bill*, issued *by and under* the authority of the Legislature of one of the United States of America, imply, by necessary implication, that it was issued by an incorporated institution, and consequently such an averment in an indictment must be held sufficient. This indictment is conformable to the precedent furnished by Judge Aikens, in his book of forms, as applicable to the statute of 1818, and which, I believe, was introduced into general use. If the Revised Statutes introduced, in this particular, no new rule of law, then an indictment under the old statute would be good under the Revised Statutes.

It is said, that, as the indictment charges the offence to consist in uttering and giving in payment a certain counterfeit *bank note*, and as the statute creating the offence makes it to consist in uttering and giving in payment any counterfeit *bank bill* or *promissory note*, the offence in the statute is not well described in the indictment. The words of the statute, in the description of the subject matter of the offence, must be substantially followed, it is true, and the of-

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ference be brought within all the material words of it. We think that the words *bank bill* or *promissory note*, as used in the statute, are *synonymous*. The words used in the indictment, *bank note*, are also synonymous with *bank bill*. Bank note, bank bill, and promissory note, issued by the directors of a bank incorporated by and under the legislature of this state, mean the same thing. The expression, *bank bill* or *promissory note*, in the statute, is an evident tautology; and had the term, or *bank note*, been also added, it would, none the less, have been a tautology. See *Brown v. Commonwealth*, in error, 6 Mass. 59, and also *Commonwealth v. Carey*, 2 Pick. 47.

It is farther objected to this indictment, that it is not alleged that the bill was passed as a *true bill*. In an indictment upon a penal statute the prosecutor must set forth every fact, that is necessary to bring the case within the statute. The indictment in this case has four counts; the 1st and 3rd are for *uttering, passing and giving in payment*. The 2nd and 4th are for having in possession counterfeit bills with an intention to *utter, pass and give in payment*. The statute of 15 Geo. II provided, that, if a person should *utter, or tender in payment*, any false or counterfeit money, knowing the same to be false or counterfeit, he should, on conviction, be subject to certain penalties. In the case of *The King v Franks*, 2 Leach Cr. L. 644, the indictment charged the respondent simply with *uttering* a piece of *false* and *counterfeit* money; and it was held that the offence was complete, even though it was uttered as base coin. In that case the indictment did not state the *uttering* to have been in payment, *as* and for a piece of good money; and if it had, the evidence in the case would have rebutted the charge. It was considered, in that case, that, as the statute was in the disjunctive, the *uttering* and *tendering in payment* constituted two independent and distinct acts. So I think our statute, providing against *uttering, passing, or giving in payment* any false and counterfeit bill, makes the acts distinct and independent, and that either the *uttering, passing, or giving in payment*, would constitute an offence against the statute, provided the respondent had a knowledge that the money was counterfeit.

Whether, if this had been an indictment simply upon the last

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clause, that is, for giving in payment a false and counterfeit bank bill, it would have been necessary to have alleged that it was given in payment, *as and for a true bill*, it is not now necessary to decide. In the case *State v. Randall*, 2 Aik. 89, we have the form of an indictment like the present, under the statute of 1818; and it was held sufficient. Neither in that statute, nor in the Revised Statutes, is it made a part of the description of the offence, that the counterfeit bill shall have been *uttered, passed, or given in payment, as and for a true bill*; and it is unnecessary for us to decide what would have been necessary, if this had been a part of the description of the offence. The offence of disposing and putting away forged bank note was held to be complete, though the person, to whom they were disposed of, was an agent for the bank to detect *utterers*, and applied to the prisoner to purchase forged bank notes, and had them delivered to him as forged notes, for the purpose of disposing of them. Russ. & Ry. C. C. 154.

It is said, also, that the indictment is bad, because there is a repugnancy between the *purport* and *tenor* of the bill, as alleged in the indictment. We think there is no ground for this objection. The indictment set forth the counterfeit bills in their words and figures, as it was proper it should do; and the allegation, that the bill, charged to be forged in each count, was made in *imitation* of, and *did purport* to be, a bank note, issued by the Bank of Cumberland, is nothing more than an allegation that the bill was a fiction, and it is no attempt to set forth the forged bill according to its *purport*. It may be true, that, where the pleader first sets out the bill according to what he claims to be the legal *purport*, and afterwards sets it out according to its *tenor*, and there is a repugnancy, it may be fatal; but that principle does not apply to this indictment.

The result to which the court have come is that the indictment is sufficient.

After the decision of the court was pronounced, the prisoner was permitted to plead over,—the court considering it a matter in their discretion to allow it, or not; and the case was remanded to the county court to be tried upon a plea of not guilty.

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GUY CATLIN v. GEORGE A. ALLEN.

It is too well settled to admit of a doubt, that an action for money had and received will lie to recover back money which has been paid upon a judgment subsequently reversed; and such action may be sustained, either against the party who prosecuted the suit, and for whose benefit the money was paid, or against his attorneys, while they retain the money in their hands. BENNETT, J.

But the party, in whose name the original suit was prosecuted, and against whom the final judgment, reversing the former judgment, was rendered, is not estopped, by such judgment, from proving, in an action brought against him by the defendant in that suit to recover back money paid by him on the former judgment, that he was merely *nominal* plaintiff in that suit, without any interest therein, and that that fact was known to the defendant therein, and that no portion of the money so paid was ever received by him or paid to his use.

Therefore, where an action on a jail bond was prosecuted in the name of the sheriff, to whom it was taken, and judgment was rendered for the plaintiff therein, and the county court refused to stay execution, and the defendant in that action paid the amount of the judgment, and subsequently the judgment was reversed, and final judgment was rendered in favor of the defendant, it was held, in an action brought by that defendant against the sheriff, to recover back the money so paid, that the sheriff might prove that he had no interest in that suit, and never received any portion of the money so paid, but that the action was prosecuted by one who claimed to own said bond by purchase, and that this fact was known to the defendant in that suit, and that the plaintiff in interest received the money so paid by the defendant; and these facts were held a valid defence for the sheriff in this action.

And it was held that the attorneys of record for the plaintiff in the former suit were competent witnesses for the sheriff, in this suit, to prove those facts.

INDEBITATUS ASSUMPSIT for money had and received, and for money paid, laid out and expended. Plea, the general issue, and trial by the court.

The plaintiff, to sustain the issue upon his part, gave evidence from which it appeared that the defendant, Allen, at the August Term of Chittenden County Court, 1839, recovered a judgment

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against the plaintiff and one William Ogden, in an action upon a jail bond, taken by the said Allen as Sheriff of Chittenden County; that the court rendering said judgment refused to stay execution thereon; that the plaintiff, Catlin, paid the amount of said judgment to Messrs Maeck & Smalley, attorneys of record for the plaintiff in that case; and that said judgment was reversed by the Supreme Court, and a final judgment rendered in favor of the defendants in that suit.

From the record in that suit, which was introduced by the plaintiff as evidence in this action, it appeared that the defendants in that suit pleaded in bar thereof that the judgment, described in the jail bond on which that suit was predicated, was rendered on a joint and several note given to Orvis & Cole and signed by the said Ogden and one Nathaniel Blood, and that, after Ogden was committed to jail, and after the giving the jail bond, and before any breach thereof, the said Blood, as a joint promissor with Ogden, paid to Orvis & Cole the full amount of said judgment and all costs. To that plea the plaintiff in that suit replied, that Blood was a mere surety for Ogden on the said note; that, after a large amount of costs had accrued in the action upon the note, for which costs Blood was in no way liable, Blood purchased of Orvis & Cole the judgment recovered by them in the action upon the note, and also the jail bond; and he traversed the averment in the plea that Blood paid said judgment and costs as a joint promissor with Ogden.*

The defendant, Allen, then offered J. Maeck, and D. A. Smalley, the attorneys of record for the plaintiff in the action upon the jail bond, as witnesses, to prove that Nathaniel Blood brought the jail bond to them, claiming to be the owner and equitable assignee thereof, and procured them to bring the suit thereon in Allen's name,—who had never assigned said bond, but had delivered it to Blood for that purpose,—and that they did so bring the suit; that they were never in any way directed by Allen to bring the suit, and he never controlled the same, but they considered Blood their sole client in the case; that the money, paid to them by the plaintiff, Catlin, on said judgment, was by them received for Blood, and a part of it was passed to Blood's credit upon their books, and the

*See that case reported at length, *Allen v. Ogden et al.*, 12 Vt. 9.

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balance paid to Blood's order; and that Allen never, in fact, personally received any of said money.

The plaintiff objected to the competency of Maack and Smalley, as witnesses, on the ground of interest, and also objected to any evidence being given of the facts above set forth; but the court overruled both objections, and the witnesses testified, as above detailed.

Upon these facts the county court rendered judgment for the defendant; to which decision the plaintiff excepted.

C. D. Kasson for plaintiff.

I. It is well settled, that a party can recover back money, which he has been compelled to pay under an erroneous or reversed judgment. 31 E. C. L. 206. *Lazell v. Miller*, 15 Mass. 207. *Stiles v. Middlesex*, 8 Vt. 436. *Hopkinson v. Sears*, 14 Vt. 590. The only question here is, of whom, or in what manner, is it to be recovered? In *Parsons v. Lloyd*, 3 Wils. 341, *Turner v. Felgate*, 1 Lev. 95, 2 W. Bl. 845, and *Tichout v. Cilley*, 3 Vt. 416, it is treated as settled law that the *nominal party* plaintiff is liable, in *tort*, for all *tortious acts*, done under his process, whether it be *void*, or *voidable*, or any way irregular, and that the officer is not in such case liable; and we understand the defendant's argument to admit the liability in this case, had the injury been a *tort*. But here no *tort*, strictly speaking, was committed by the officer. The only injury done was the causing Catlin to pay the money. Is Allen, then, any the less liable, as the nominal party, because the injury was of a less outrageous character? We say not; but on the contrary there is the greater reason for his liability. *Lamine v. Dorrell*, 2 Ld. Raym. 1216. *Davis v. Hoy*, 2 Aik. 310.

II. We contend that the money was *in fact* paid to *Allen's use*. It was paid on a *sheriff's bond*; and, if he saw fit to sue in his own name, instead of assigning the bond to the creditors, he was liable to them for the amount of the recovery. He had in fact an *interest* in the recovery, arising out of his official relation. Hence it matters not in this case if the money did in fact go to the creditors entitled to it, as, if so, it was so far in discharge of his liability to them for it.

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III. It is clear that *somebody* has "received" the plaintiff's money, and equally so that he has "paid" it to *somebody's* "use," and that, too, under circumstances giving him a right of action against such person. The cases all agree that the officer is not liable, and also that the attorneys are not liable, as these are but mere agents. *Sadler v. Evans*, 4 Burr. 1984. *Pond v. Underwood*, 2 Ld. Raym. 1210-11. 22 Wend. 348. *Stephens v. Badcock*, 3 B. & Adol. 354. Chit on Cont. (5th Am. Ed.) 216, (note 2,) 601, 605 n. (1,) 610.

IV. The liability rests, therefore, on Allen, or Blood, who it is said received the money, which Allen brought a suit to recover for him. We deny that we are to be turned over to Blood for several reasons.

1. That, by the *record*, it appears that Allen sued out the process,—that Maec & Smalley were *his* attorneys,—that *his* execution was paid; and we insist that he is thereby *estopped* from showing by parol that this entire *record* is, throughout, one complicated *lie*.

2. Catlin, in paying the money, was dealing on Allen's responsibility alone; he knew nothing of Blood. See Chit. on Cont. and *Stephens v. Badcock*, above cited. Allen had allowed himself to be held out to him as *principal*, and, relying upon such representation, he paid the money.

3. Allen, having knowledge of all the facts, might have claimed an indemnity. He gave up the bond to be sued, with a full knowledge of the consequences, and it was his own fault if he trusted bad agents.

4. Public policy requires it. The money was recovered on Allen's *official bond*; and it is not to be endured that a public officer shall be allowed to tamper with his securities, taken in *virtue of his office*, and farm them out to barratrous bankrupts for vexatious suits, receiving all the benefits of a party to the record, but shielding himself from its liabilities.

5. A farther potent reason is given by *Rooke* and *Heath*, Justices, in *Bush v. Steinman*, 1 Bos. & Pul. 404, *that it would*, in many cases, work a total denial of justice, if a man is to be driven to search out the secret instigators of suits.

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6. This action proceeds upon the ground that there is something *ex æquo et bono* due to the plaintiff. *Moses v. Mc Farland*, 2 Burr. 1005.

V. Maeck & Smalley were not competent witnesses.

1. The evidence offered required a disclosure of professional communications.

2. They were interested to defeat a recovery, as they might be liable over to Allen for a perversion of the funds, or for using his name without authority in the suit, if such were the facts. 3 Stark. Ev. 17, 37, 38, 1722, and cases there cited.

D. A. Smalley and J. Maeck for defendant.

1. There is no evidence to support the count for money paid. To recover on the count for money had and received it must clearly appear that the defendant has received money, or something which has actually been converted into money. Chit. on Cont., Ed. of 1842, 602-3, and cases there cited. Stark. Ev. 106, and cases cited. In this case the plaintiff's evidence does not show the money into the defendant's hands, but the reverse; and, even if he had received it, this action could not have been maintained, as he is shown to have been the mere trustee, or agent, of Blood, and the money was paid to the principal before this action was commenced. *Sadler v. Evans*, 4 Burr. 1985. *Greenway v. Hurd*, 4 T. R. 553. *Buller v. Harrison*, Cowp. 566. *Stevens v. Badcock*, 23 E. C. L. 93. *Baron v. Husband*, 24 Ib. 123. *Whitbread v. Brooksbank*, Cowp. 69. *Cox et al. v. Prentice*, 3 M. & S. 344. *Stratton v. Rastall et al.*, 2 T. R. 366. 2 Stark. 113. *Horsefall v. Handley*, 4 E. C. L. 46. Chit. on Cont., Ed. of 1842, 610-11. The only case, we have been able to find, which tends to support the principle contended for by the plaintiff, is that of *Lyman v. Edwards*, 2 Day 153; and that case was considered of doubtful authority in *Field v. Maghee*, 5 Paige 539, and was expressly overruled in *Maghee v. Kellogg*, 24 Wend. 32.

2. The position, taken by the plaintiff, that the defendant is *estopped* from averring that the money was not received by him, is unfounded. The *nominal* plaintiff is liable, indeed, for costs, and must be made a party in a writ of *error*, or *audita querela*; but this

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is the extent. Not even the case of *Tichout v. Cilley*, 3 Vt. 415, goes so far; and the case of *Ross v. Fuller*, 12 Vt. 265, puts this doctrine upon its true foundation, and sufficiently answers this argument.

3. The objection, that the witnesses, introduced by the defendant, were interested, is not sustained. The plaintiff shows that Allen knew of the pendency of the suit, and there is no pretence that he forbid their proceeding.

The opinion of the court was delivered by

BENNETT, J. It is too well settled to admit of debate, that, as a general rule, an action for money had and received will lie to recover back money collected under a judgment subsequently reversed; but the question is, will it lie under the particular circumstances of this case? The judgment against Catlin was obtained in an action upon a jail bond, executed to Allen as sheriff of the county of Chittenden, upon one Ogden's being committed to jail upon an execution in favor of Orvis & Cole. Catlin signed the bond as surety. It appears that one Blood claimed to be the owner and equitable assignee of the bond, and that he procured the suit to be brought upon it, in the name of the sheriff, but for his own benefit. The sheriff had not assigned the bond in form, but had delivered it to Blood for the purpose of collection.

The attorneys, who prosecuted the bond, were employed by Blood, and accounted to him for the money collected. No part of the money was ever paid to Allen, and indeed he had no right to the receipt of it. Catlin was fully advised, while the suit was pending upon the bond, by the pleadings in the case, that Blood claimed that he had purchased of Orvis & Cole the judgment and the bond, and of course understood that he claimed to be prosecuting it for his benefit. As to the validity of this purchase, as between Orvis & Cole and Blood, it matters not, so far as this suit is concerned. Notwithstanding these facts, it is claimed that the defendant is liable for money had and received.

It must readily be admitted that the action would lie against Blood, or against his attorneys, while they retained the money in their hands as belonging to Blood. This is in accordance with

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well settled principles; and the case of *Maghee v. Kellogg*, 24 Wend. 32, is a full authority to that effect. Upon the reversal of the judgment, Blood could have no equity in retaining the money against Catlin. Upon such reversal, Allen's right, had he been the real plaintiff, must have been at an end; and he being but nominal party, the same result must follow as to him, who has the real interest.

But it may be said, this is not decisive, and that Catlin should have his election to sue either Blood or Allen. It is quite clear that Allen has not in fact received any of the money collected under the judgment, and had no right to receive any. The bond was given to him as sheriff of the county, and it was his right to assign it to the creditor, and thereby shield himself against an action for an escape. If called upon by the assignee of the judgment creditor, it would be equally the duty of the sheriff to assign the bond; but in the present case Blood did not call for an assignment of the bond, but was satisfied with its delivery to him by the sheriff, with an understanding that he might prosecute it, in the name of the sheriff, for his own benefit. The sheriff received no consideration from Blood for the delivery of the bond to him, and he was in no way answerable over to the judgment creditors, or to Blood, in case of a failure to recover upon the bond. How then can it be said that the sheriff had an interest in that suit, or in its result, beyond his liability for costs? His name was used, in the strictest sense, in trust, and he was a mere man of straw. This was so understood by Catlin,—so regarded by both parties. We think it is clear that Allen has not, in fact, received any money to the use of Catlin, and, upon principle, should not be held liable.

It is, however, alleged in argument, that Allen, being plaintiff of record, is estopped from denying that the money was collected to his use. We think not. We have fully adopted the doctrine, that, even at law, we will look beyond the record and see who is the real plaintiff, and will recognise and protect the rights of the assignee, as fully as if he was the plaintiff upon the record. There is, then, no estoppel in such case, operating in favor of the defendant against the assignee; and when his interests require it, we regard him as the real party. It is true, that the party upon the record, though but nominal, is liable for costs; and proceedings upon the

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judgment must be in his name. The case of *Ross v. Fuller et al.*, 12 Vt. 265, proceeds upon the ground, that, when there is an attempt to fix a liability upon a party upon the record in a new and independent proceeding, he may be permitted to show the true relation, in which he stands to the suit. This is in accordance with well settled principles.

We think that Messrs Maeck and Smalley were rightfully admitted as witnesses in the county court. There is nothing in the case which would show them liable over to Allen, in case the plaintiff should have recovered in this suit. It appears, from the plaintiff's own showing, that the suit on the bond was prosecuted with the full knowledge of Allen, and that he in no way expressed his dissent to the proceeding. He of course must have assented to their having acted as attorneys, under proper authority; and, as it respects the competency of these witnesses, I do not conceive that it is material, whether this authority was derived immediately from Allen, or from Blood, who claimed to be, and acted as, owner of the demand.

We are all agreed in affirming the judgment of the county court.



BENJAMIN MCFARLAND, Adm'r of EBENEZER BURDICK, v. STAFFORD STONE.

[Same Case, 16 Vt. 145.]

The legality of the appointment of an administrator by the probate court cannot be inquired into in any other court, nor collaterally questioned in any way.

An administrator may maintain an action for the recovery of the possession of real estate, for the use of the heirs, until after a decree of distribution has been made by the probate court. And in this respect it makes no difference whether the descent was cast under the statute 1797, or under the statute of 1821.

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But the administrator can only recover, in such case, according to the rights of the heirs at the commencement of the action; and if the rights of some of the heirs are barred by the statute of limitations, and the rights of others are saved by their being under certain disabilities, the recovery will be of those shares, only, which are not lost.

And in such case, the defendant having acquired a title by possession as against some of the heirs, the remaining heirs, whose rights are saved from the operation of the statute, will be tenants in common with the defendant.

A disability, to save the operation of the statute of limitations in regard to real estate, must exist in the heir *at the time* the right, or title, first descends to him. Hence *successive* disabilities, though existing in the same person, cannot exempt his right from the operation of the statute.

The doctrine of presumptive grants cannot be applied to a case which is within either the enacting or saving clause of the statute of limitations; it applies only to cases which are not strictly within the statute.

In case of tenancy in common of real estate, the right of part of the tenants to recover in ejectment is not affected by the fact that the rights of their cotenants are barred by the operation of the statute of limitations.

Any entry upon land, which puts in operation the statute of limitations against him whose right is superior, creates an *ouster*.

It seems, that in ejectment, where the defence is adverse possession founded on claim of title, the statute of limitations will bar all claim for the recovery of the rents and profits, which accrued more than six years prior to the commencement of the plaintiff's action.

EJECTMENT for a lot of land in Westford. Plea, the general issue, and trial by jury.

On trial it was admitted by the defendant that the said Ebenezer Burdick died intestate, at Westford, in 1815, or 1816, seized and possessed, in fee, of the premises described in the plaintiff's declaration;—that at his decease he had living nine children, viz. six sons and three daughters, who were the heirs to his estate;—that the five oldest children became of age more than fifteen years prior to the commencement of this action;—that the next child, a daughter, named Nancy, after the death of her father, and before she be-

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came eighteen years of age, was married, and lived with her husband until his death, which was in September 1840; that the next child, Olive Burdick, after the death of her father, and before she became eighteen years of age, was married to the plaintiff in this suit, and lived with him to the time of trial;—that the two remaining children, one son and one daughter, had neither of them been of age more than fifteen years before the commencement of this suit;—and that the four last named children were still living.

The defendant farther admitted that the plaintiff took out letters of administration on the estate of the intestate, February 3, 1841; that no administration was ever before taken on said estate, and no settlement of the estate ever made; and that the defendant had been in the exclusive possession of the premises for about ten years last past, and to the time of trial, under the deeds given in evidence by him, and claiming the entire estate, interest and title in and to the premises so possessed by him. It was also admitted by the parties that the possession had accompanied the deeds given in evidence by the defendant.

The defendant offered in evidence a deed of the premises from George Cleaveland, collector, to Isaac Chase, dated July 3, 1818,—to which the plaintiff objected, and it was excluded by the court as evidence of title, but allowed to be read as evidence of the claim of title, and to mark the extent of the defendant's possession. The defendant also gave in evidence a deed of the same premises from Isaac Chase to Jemima Burdick,—who was admitted to be the widow of the intestate and mother of the children above named,—and also deeds of the same premises from Jemima Burdick, through divers grantees, to the defendant.

The defendant contended,—1, That a deed was to be presumed;—2, That no right existed on which administration could be granted;—3, That if the statute of limitations begins to run against one heir, it runs against all;—4, That successive disabilities cannot be allowed; and therefore that the right of Nancy and Olive was gone;—5, That the administrator cannot claim in behalf of the heirs;—6, That the defendant was tenant in common with the heirs, and that there could be no recovery without a demand;—and 7, If the administrator could claim for the heirs, it was a joint ac-

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tion, and that there could be no recovery, unless all the heirs were entitled to recover.

The plaintiff insisted, and requested the court to charge the jury, that he was entitled to recover the whole premises, of which the defendant was in possession at the commencement of the suit, and that the statute of limitations was no bar to such recovery;—that if not entitled to recover the whole, then he was entitled to recover, not only the shares of the two heirs who had not been of age fifteen years, at the commencement of the suit, but also the shares of Nancy and Olive, who were married before they arrived at the age of eighteen years,—being five fifteenths,—and that the statute of limitations did not run against them while minors, or *femes covert*;—and that the plaintiff was entitled to recover rents and profits for the whole time the defendant had been in possession.

The court refused to charge as requested by either of the parties, but did charge the jury that the plaintiff was entitled to recover only three fifteenths* of the premises, of which the defendant was in possession at the commencement of the suit, with rents and profits only for the last six years next previous to the commencement of the suit, and to the time of trial. The jury returned a verdict for the plaintiff in accordance with the instructions of the court. Exceptions by both parties.

C. Adams for defendant.

1. The defendant's title to the land had become perfect, before administration was granted to the plaintiff; for the defendant, and his grantors, had been in uninterrupted possession of the land for more than twenty three years. It is a principle as old as Blackstone, that, on the death of the ancestor, the fee instantly descends to the heir. An entry and ouster of Burdick in his lifetime, if the possession is continued, would transfer his title, though his death should intervene. So, in like manner, this entry and ouster of the

*Being the shares of the son and daughter who had not been of age fifteen years at the commencement of the suit, computed according to the statute in force at the decease of the intestate, by which sons took portions double in amount of those allowed to daughters.

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heirs, being continued for more than twenty three years, has vested their title in the defendant. An entry and ouster of the executor, or administrator, would not necessarily vest the title, and simply for the reason that the title is not in them. It might bar *their* right to recover, but the heir might sue, and, on bringing himself within any of the savings of the statute, would recover. *Conant, Adm'r, v. Hitt*, 12 Vt. 285. *Hubbard v. Ricart*, 3 Vt. 207. *Webster v. Webster*, 10 Ves. 93. *Beckford v. Wade*, 17 Ves. 93. *Hickman v. Walker*, Willes 27. *Cushman v. Jordan*, 13 Vt. 597.

2. Exemption from the operation of the statute is a personal privilege, and confined wholly to the person of the party suing. The administrator cannot put in issue the fact that the heirs are minors, nor can that fact be tried in this case, nor would any decision of it conclude the heirs.

3. The administrator is not the trustee of the heirs. If a recovery should be had on the ground that a particular heir was a minor, it would not avail that heir, for the land could not be set to him exclusively, but the probate court would divide it among all the heirs. The administrator is more properly the agent of the law, charged with the duty of enforcing such lien as the creditors may have upon the land; and when their claims are satisfied, his power over the land ceases.

4. The plaintiff's claim is indivisible, and he must recover the whole, or none. If he is to be regarded as a trustee, he is a trustee for all the heirs, and his claim is to have the same effect, as if all the heirs, in person, had joined in the suit. A joint suit by all the heirs would be defeated on the failure of title in any one of them. *Univ. of Vt. v. Reynolds*, 3 Vt. 557. *Perry v. Jackson*, 4 T. R. 516. *Langdon v. Rowleston*, 2 Taunt. 441. *Marsteller v. McLean*, 7 Cranch. 359.

5. Successive disabilities are not to be allowed; and hence, if the plaintiff recovers, he can only recover for the shares of the two youngest children, who had not been of age fifteen years before the commencement of this suit. *Eager v. Commonwealth*, 4 Mass. 182. *Bunce v. Wolcott*, 2 Conn. 27. *Griswold v. Butler*, 3 Conn. 227.

6. The jury should have been instructed that they might presume a deed, to support the title of the defendant.

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7. The plaintiff cannot recover without proof of a demand and refusal, or an actual ouster. The plaintiff rests his case on the ground that he and the defendant are tenants in common; and if so, the defendant is entitled to the rights of a tenant in common, and cannot be ejected without a demand to be let in.

Hyde & Peck for plaintiff.

1. The plaintiff was entitled to recover the whole premises. The intestate died in possession of the premises, and no right of entry, or action, accrued till after his death. The statute of limitations, therefore, does not begin to run till administration granted, there being no cause of action until there is a party capable of suing. *Curry v. Stephenson*, Skin. 555, [4 Bac. Abr. 479.] *Stanford's Case*, cited in *Saffyn v. Adams*, Cro. Jac. 60-61. *Murray, Adm'r, v. East India Co.*, 5 B. & Ald. 204, [7 E. C. L. 66.] *Fairclaim v. Little*, cited in *Ib.* 4 Bac. Abr. 479. *Ruff's Adm'r v. Bull*, 7 Har. & J. 14. *Haslett's Adm'r v. Glenn*, *Ib.* *Hepburne's Adm'r v. Sewell*, 4 Har. & J. 393, 430. Chit. on Cont. 313. *Douglas et al. v. Forrest*, 15 E. C. L. 113-120. This rule applies in all cases, where the cause of action vests in the personal representative of the deceased; and as the statute, [Sl. St. 346 § 63,] vests the right of action for the recovery of lands in the administrator, and prohibits the heirs from bringing such action, this case is within the rule, and the right of none of the heirs is barred. *Hubbard v. Ricart*, 3 Vt. 207, is confined to cases where no division can possibly be necessary. *Boardman v. Bartlett*, 6 Vt. 631.

If, under this statute, real estate vests in the heirs at the death of the ancestor, it is but a conditional, or contingent, estate, or at most but a remainder, or a fee encumbered by a particular estate, and the statute does not begin to run until such estate, or encumbrance, is removed, or determined. *Allen v. Blakeway*, 24 E. C. L. 456. 2 Cruise's Dig., Tit. 31, c. 2, § 24. *Blanchard on Lim.* 32, [1 Law Lib. 17.] 2 Preston on Titles 397, 337. *Clark v. Vaughan*, 3 Conn. 191. *Ricard v. Williams*, 5 Pet. Cond. R. 257-258.

2. If the court settle the rights of the heirs as at common law, where the heirs have exclusive and immediate control over the real estate, then the plaintiff is entitled to recover the shares of those

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who had not been of full age fifteen years at the commencement of the suit, and also the shares of Nancy and Olive, who married before eighteen years of age. Successive disabilities in the same person to whom the right first accrued, where no time intervenes, may be attached to save the operation of the statute. 2 Preston on Titles 340, 397. 1 Kent 514. Blanch. on Lim. 19, 21, [1 Law Lib. 10, 11.] Adams on Eject. 45.

No English reported case contravenes this doctrine, either expressly, or by implication. The cases where supervenient, or successive, disabilities have been held not within the saving of the statute are of three classes. 1. Where the person to whom the right *first accrued* was, at the time, free from disability, and a disability afterwards came upon him. 2. Where a time intervened between successive disabilities in him to whom the right *first* accrued. 3. Where successive disabilities existed in different persons, the latter succeeding to the rights of the former.

The case of *Stowell v. Zouch*, 1 Plowd. 353, and all the two first classes of cases, rest on the principle that the time limited by statute [4 Hen. 7, c. 24; 21 Jac. 1, c. 163,] must be continuous, and the statute once having attached, a subsequent disability will not arrest it. 1 Plowd. 371, 372. Blanch. Lim. 18. As to the third class,—2 Inst. 519, *Dillon v. Leman*, 2 H. Bl. 584, *Cottrell v. Dutton*, 4 Taunt. 825, and Arch. Pl. 29 support the doctrine that successive disabilities in different persons, if continuous, may be attached; but *George v. Jesson*, 6 East 80, is to the contrary; but the latter case is put on the words “first” and “heirs” in the English statute, restricting the saving of the statute to disabilities in the person to whom the right *first* accrued.

In *Bunce v. Wolcott*, 2 Conn. 27, the mortgage was forfeited, and the right to bring a bill to redeem accrued to Benton in his lifetime. In *Eager v. Commonwealth*, 4 Mass. 182, the right of action accrued to Martin,—through whom the plaintiff, his heir, claimed,—three years before his death; which brings the case within the principle of *Stowell v. Zouch*. *Griswold v. Butler*, 3 Conn. 227, was a case of successive disabilities in *different persons*, and a cessation of disability in the the person to whom the right of entry first accrued.

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If, by the Connecticut and Massachusetts statutes, and the statute of 21 Jac. 1, successive disabilities in the same person cannot be attached, it is by reason of the words,—“*at the time the said right or title first accrued*,”—which are omitted in our statute. See Sl. St. 291, § 10. This statute exempts persons under disabilities absolutely and unconditionally, while the English statute gives but ten, and the Conn. and Mass. statutes but five years after disability removed. The sound construction is, that the statute shall not attach, until there is a freedom from disability. There is no distinction between a *voluntary* and an *involuntary* disability;—so that had insanity, instead of coverture, supervened, the result must be the same.

From analogy to other decisions this case comes within the *equity* of the proviso, if not within the letter, and is excepted by implication. *Phelps et al. v. Wood*, 9 Vt. 399. *Ferriss v. Barlow*, 8 Vt. 90. *Spear et al. v. Newell*, 13 Vt. 288. *Hall v. Hall*, 8 Vt. 156.

3. This is not a case in which a conveyance can be presumed. Where the statute applies, no presumption can arise from adverse possession for a period less than that required by the statute, and no conveyance can be presumed from those constantly under legal disability, as a party cannot be presumed to have done what he had no legal capacity to do. *Wells et ux. v. Morse*, 11 Vt. 9. *Spear et al. v. Newell*, 13 Vt. 288. *Sumner et al. v. Child*, 2 Conn. 607. 1 Cow. & Hill's notes to Ph. on Ev. 356. *Eldridge v. Knott et al.*, Cowp. 214.

4. Administration, having been granted by a court of competent jurisdiction, cannot be collaterally impeached.

5. If some of the heirs are barred, the rights of others remain perfect. The action is not in the nature of a joint action in the name of all the heirs, as the administrator represents those, only, whose rights remain. The cases where joint actions have been defeated, by some of the plaintiffs being barred, are where the objection was, not to the *right*, but to the remedy,—it being necessary that all the plaintiffs should recover, or none. Adams on Eject. 56. *Langdon v. Rowleston*, 2 Taunt. 441.

6. If the plaintiff and defendant are tenants in common, the facts admitted show an ouster, and no demand was necessary. Ad.

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on Ej. 54-56. *Fiskar et ux. v. Prosser*, Cowp. 217. *Hellings v. Bird*, 11 East 49. *Valentine v. Northrop*, 12 Wend. 494. *Pomeroy v. Mills*, 3 Vt. 410. *Clark v. Vaughan*, 3 Conn. 191. *Catlin v. Washburn*, 3 Vt. 26-40.

The opinion of the court was delivered by

REDFIELD, J. 1. No question can properly be made here, or in the county court, in regard to the legality of the appointment of the plaintiff as administrator. That is a matter resting *exclusively* within the jurisdiction of the probate court, and cannot be inquired into in any other court, nor collaterally questioned in any way. The appointment by that court is as conclusive as the judgment of any other court of competent jurisdiction, and cannot be set aside, or impeached, in any other way than by proceedings in the probate court for that express purpose.

2. Upon the question whether the administrator can maintain an action to recover lands for the benefit of the heirs, there can be little doubt. The statutes of 1797 and of 1821 [Tol. St. 144, § 66; Sl. St. 346, § 63,] are almost precisely the same, in regard to the authority of the administrator to bring actions of ejectment for the benefit of the heir. Both statutes expressly give the authority to the administrator to bring such action, or to prosecute one already brought by the intestate, "*to the use of the devisees, heirs, or creditors, of such estate, as the case may be.*" It is true that the statute of 1821 expressly prohibits the heir, or devisee, of land from bringing an action of ejectment to recover the same, until decree of distribution. But that will not affect the right of the administrator to bring such action, which is given in express terms, unless we suppose the legislature intended to make a distinction between the right of the administrator to bring suits and to prosecute those already brought, which is not supposable.

3. But the right of the administrator to maintain an action "to the use of the heir" must depend upon the *continuing* right of the heir. The administrator's right, in such case, is only incidental to that of the heir; and when the principal right is gone, the incident must fall with it. And as there can be no doubt that the heirs could have maintained an action in their own names, while the

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statute of 1797 was in force,—and, having acquired this right under that statute, they would not be deprived of it by the prohibition in the statute of 1821,—the rights of all the heirs, except the three girls and the youngest son, are clearly barred by the statute of limitations. And even if we should hold that the rights of heirs, accruing under the statute of 1797, will be suspended by that of 1821, the statute of limitations will equally prevail, whether the right of the heir is to sue in his own name, or in that of the administrator. But in practice the rights of heirs have been determined by the laws in force at the time of the descent cast, and this even in regard to the bringing of suits.

In regard to those heirs who have been under successive disabilities, until within the term of fifteen years before suit brought, we feel unable to say that they are exempt from the operation of the statute. Our statute of limitations is so similar to the English statute, in this respect, that we should hardly feel justified in departing from the construction adopted by the English courts, inasmuch as that was known to the legislature at the time of passing the statute, and, it may well be presumed, was expected to be adopted by our courts, and was thus virtually made a part of the act itself,—as is the case in regard to all the English statutes which have been adopted here; it is to be presumed it was done with the construction they had received in that country, unless the phraseology has been so modified as to exclude such construction.

The English statute is, to be sure, more explicit upon the matter of successive disabilities than our statute; but the general scope of the statutes is the same. The English statute says, “such person,” that is, the person disabled, “or their heirs, may bring the action within ten years after his, or their, *full age, dis-coverture, coming of sound mind, or death;*” thus obviously excluding the idea of successive disabilities, either in different persons, or the same person. It obviously confines the disability to one person. It is farther provided that the disability shall have existed “*at the time the said right, or title, first descended.*” Hence it is admitted, that, if more than one disability exist at the time the right accrues, the statute will not begin to run until *all those* disabilities are removed. This is consistent with the terms of the statute, and necessary to a ra-

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tional application of its principles. The statute was intended to save the rights of the party until all those disabilities, *existing at the time the right accrues*, are removed. And we are not prepared to extend our statute of limitations farther than it has been extended in Westminster Hall, or any of the American states. *Stowel v. Lord Zouch*, 1 Plowd. 353. *Demarest v. Wynkoop*, 3 Johns. Ch. R. 129. *Eager v. Commonwealth*, 4 Mass. 182. In Connecticut this rule was at first disregarded; *Eaton v. Sanford*, 2 Day 523; but that case was finally overruled in *Bunce v. Wolcott*, 2 Conn. 27.

This disposes of the shares, except those of the daughter and son, whose shares it is not pretended are barred by the statute of limitations. And as this is a case where the statute applies, we could not also apply the doctrine of presumptive grants, which only applies to those cases which are not strictly within the statute. As this is not a case of joint tenancy,—in which all must join in bringing suit,—the rights of some may be barred, and not those of the others,—as some might have conveyed their interests by deed, or be barred by estoppel;—so also by the statute of limitations. One tenant in common may recover the whole estate against a stranger; and in Vermont tenants in common may join, by special statute; but it has never been held, that, the right of one tenant in common being barred by the statute of limitations, the rights of all were gone, notwithstanding they were under disabilities;—and such a doctrine would be strict and unreasonable. *Hicks v. Rogers*, 4 Cranch 165. 1 Ch. Pl. 56.

There can be no doubt as to the proof of ouster. The same proof, that puts the statute of limitations in operation, creates an ouster. In the present case the bill of exceptions states explicitly, that the defendant “had been in the exclusive possession of the premises for about ten years past, and up to the present time, under the deeds given in evidence, claiming the entire estate.” There would seem to be very little lack of proof upon this point.

Judgment affirmed.

Manwell, Adm'r, v. Briggs.

DULCINIA MANWELL, Adm'r of STEPHEN MANWELL, v. WILLIAM P. BRIGGS.

The doctrine of the case of *Ladd v. Hill*, 4 Vt. 164, in reference to the right of the county court to dismiss a suit for want of jurisdiction, re-affirmed.

An administrator, suing in trover, may always declare in his representative capacity, when the property belongs to the estate. And, *Per REDFIELD, J.*, if he has once had actual possession of the property, he may maintain an action of trover for it in his own name.

A contract between A., the owner of a note, and B., that B. may take the note, and collect it at his own expense, and have one half of what he collects, vests no interest in the note in B., nor does it preclude A. from collecting the note, if he has an opportunity.

A contract of sale, upon condition, vests no title in the vendee until the performance of such condition, unless the performance is waived.

A mere mental determination to rest satisfied with the non-performance of such condition, not procured by the vendee nor notified to him, will not operate as a waiver of such condition, so as to vest the property in the article sold in the vendee.

If there have been a tortious use, or taking, of property, a subsequent demand of it will not operate as a waiver of such conversion, nor entitle the defendant to prove an offer to return upon such demand."

It is error to charge the jury that they may find a fact, when there is no legal testimony tending to prove such fact.

TROVER for a note, describing it, and for a horse.. Plea, the general issue, and trial by jury. On trial there was found a fatal variance between the note offered in evidence and the declaration, and the trial proceeded as to the horse alone.

The plaintiff introduced evidence tending to prove that the plaintiff's intestate, about the year 1835, held a note against one Hoyt,

**Hart v. Skinner*, 16 Vt. 138. *Yale v. Saunders et al.*, 4b. 243. *Green v. Sperry*, 1b. 390.

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then residing in western New York, for \$65, dated in 1829; that the intestate agreed with one James Briggs, the defendant's brother, who was then going to western New York, to take the note, and collect it, if he could, at his own expense, and have, for his trouble, one half of what he collected; that the note remained in New York until the fall of 1838, which was after the intestate's death, when Hoyt returned to Vermont with a horse, which he left in the stable of one Field, in Jericho; that the plaintiff applied to Hoyt to get the horse as part payment upon the note above mentioned, and that Hoyt agreed that the plaintiff might take the horse at \$75, or \$80, and that the plaintiff agreed to give up to Hoyt the note, or, if the note was not obtained from New York, to give him a discharge for \$75, or \$80, on the note; and that the plaintiff, in the absence of Hoyt, went and took the horse from the stable of Field.

Hoyt was a witness, among others, for the plaintiff, and, on cross examination, stated that he expected the plaintiff would take the horse, and that he told her she might do so, if she would bring the note, or some paper discharging him from the note, to the amount of the value of the horse; but that she took the horse without bringing either.

The defendant, after proving the contract between the intestate and James Briggs to have been as above stated, introduced evidence tending to prove, that, about the time Hoyt returned to Jericho with the horse in question, James Briggs also returned upon a visit, and, finding that Hoyt had returned, requested his brother, the defendant, to procure the note from New York, where it then was, and either attach the horse, or in some way procure an application of the horse upon the note; that the defendant sent and procured the note, and called on Hoyt for payment a week or ten days after Hoyt had turned out the horse to the plaintiff; that Hoyt then informed the defendant that he had turned out the horse to the plaintiff upon the note, and the defendant thereupon told him that he should hold him upon the note,—but that, if he would get back the horse from the plaintiff, and deliver it to him, he would give him up the note; and that thereupon Hoyt took the horse from the plaintiff,—the plaintiff forbidding him,—and delivered him to the defendant, and the defendant delivered the note to Hoyt.

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The defendant then offered to prove, that, after he had kept the horse several months, the plaintiff came to him and demanded the horse; and that he then offered to deliver the horse to the plaintiff. To this testimony the plaintiff objected, and it was excluded by the court.

But two witnesses testified as to the value of the horse, both of whom were introduced by the plaintiff; one of them appraised the horse at \$30 or \$40,—the other at about \$30. The defendant moved to dismiss the suit for want of original jurisdiction in the county court; but the court overruled the motion.

The defendant insisted that this suit could not be maintained by the plaintiff, as administratrix, and that the contract made between the plaintiff and James Briggs could not be rescinded without the consent of James Briggs. But the court charged the jury, that, if they found that Hoyt turned out the horse to the plaintiff upon the note, and so informed the defendant, and afterwards, at the request of the defendant, took the horse against the will of the plaintiff and delivered him to the defendant, the defendant would be liable for the value of the horse. But that, if the plaintiff was authorized to take the horse from the barn of Field only upon condition that she first brought and delivered to Hoyt the note, or some paper discharging him from the note, and she in fact took the horse, in the absence of Hoyt, without complying with such condition, then Hoyt had a right to retake the horse, and the defendant would not be liable. But that, even if the plaintiff did take the horse without complying with such condition, if Hoyt was afterwards satisfied to have her keep the horse, and so informed the defendant before the defendant directed him to take the horse, the defendant would be liable, if Hoyt took the horse and delivered him to the defendant by the defendant's procurement; and that, in this point of view, the testimony above detailed, tending to show that Hoyt told the defendant that he had turned out the horse to the plaintiff, was important.

The court farther instructed the jury that the plaintiff might maintain this action in her capacity as administratrix.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

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Hyde & Peck and Briggs & Underwood for defendant.

1. The county court had no jurisdiction of the case. The case shows that an action could not be maintained for the note, and the horse was worth only \$30 or \$40.

2. The property in question having come to the plaintiff since the death of the intestate, the suit should have been *by*, and the property and possession laid *in*, the plaintiff in her own right. *Eaves v. Mocato*, 1 Salk. 314. *Jenkins v. Plume*, *Ib.* 207. *Adams v. Campbell*, 4 Vt. 448. *Hollis v. Smith*, 10 East. 293. *Marsh v. Yellowly*, 2 Str. 1107. *Bollard v. Spencer*, 7 T. R. 358. *Munt v. Stokes*, 4 T. R. 565. *Goldthwayte v. Wood*, 5 T. R. 234. Tol. on Ex'rs 439. 4 T. R. 256.

3. The contract between the intestate and James Briggs was valid, and was not vacated by the death of the intestate. The possession of the note by James Briggs was a possession coupled with an interest; the plaintiff was therefore tenant in common with him, and not liable in trover; and the defendant, his agent, has all the rights of his principal. *Hunt v. Silk*, 5 East 448. 4 Dane's Abr. 471. 14 Mass. 266. *Conner v. Henderson*, 15 Mass. 319.

4. As the plaintiff took the horse without complying with the conditions of the contract between her and Hoyt, the taking was unlawful, and Hoyt had a right to retake the property without being liable in trover; and the defendant is not liable for advising him to do a legal act.

5. There is no evidence in the case, tending to show that Hoyt had ever signified to the plaintiff his acquiescence in her act, in taking the horse before complying with the contract, or that he had in any way notified her of his intention to waive his right to retake the property; and no such intent on his part, not communicated to the plaintiff, would bar him of this right. Hoyt having this right, whatever the defendant may have said, to induce him to assert it, it would not make the defendant liable.

6. The evidence of a demand of the property by the plaintiff, and an offer by the defendant, at the same time, to restore it, although accompanied by a refusal of the plaintiff to receive it, should have been received, either in bar of the action, or in mitigation of damages. 2 Phil. Ev. 234. B. N. P. 46. 6 Bac. Abr. 629. 3

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Stark. Ev. 1167-8. *Wheelock v. Wheelwright*, 5 Mass. 104. Jac. Law Diet., Tit. TROVER. *Reynolds v. Shuler*, 5 Cow. 323. *Plevin v. Henshall*, 25 E. C. L. 17. *Cook v. Hartle*, 34 E. C. L. 528. *Baldwin v. Porter*, 12 Conn. 473. *Murray v. Burling*, 10 Johns. 172. *Shotwell v. Wendover*, 1 Johns. 65. *Haywood et al. v. Seaward et al.*, 28 E. C. L. 269. *Irish v. Cloyes et al.*, 8 Vt. 30. 1 Johns. Cas. 406. Conceding that a party, after a conversion, has his election to pursue the property or go for the value in damages, yet if he elect to follow the property, and make a demand, and the defendant then offer to restore it, he is bound by his election.

D. A. Smalley for plaintiff.

1. The county court had jurisdiction. The note described in the three first counts of the declaration amounted to about \$106, and the plaintiff had reason to suppose that she could recover for the whole. *Ladd v. Hill*, 4 Vt. 164. *Morrison v. Moore*, Ib. 264. *Spafford v. Richardson*, 13 Vt. 224. *Kittredge v. Rollins et al.*, 12 Vt. 541.

2. The horse, when taken and delivered to the defendant, was the property of the estate in the hands of the administratrix. James Briggs never had any interest in the note; he was to have *one half of what he collected*; but, when the horse was turned out to the plaintiff, he had collected nothing. The act of Hoyt, in taking the horse, was the act of the defendant. 2 Saund. R. 47 i to k. 1 Chit. Pl. 176.

3. The note and horse being *assets* in the hands of the administratrix, belonging to the estate, the money, when recovered, will also be assets. The suit is therefore properly brought in the plaintiff's representative capacity. 2 Saund. R. 47 k. *Blainfield v. March*, 7 Mod. 141. *Cowell et ux. v. Watts*, 6 East 405. 1 Ch. Pl. 23. 1 Saund. Pl. & Ev. 496. *The King v. Thom*, 1 T. R. 487. *Alling, Adm'r, v. Munson*, 2 Conn. 691. *Valentine v. Jackson*, 9 Wend. 302. *Foster v. Gorton*, 5 Pick. 185. *Baxter, Adm'r, v. Buck*, 10 Vt. 548.

4. The evidence of Hoyt was properly submitted to the jury. It was competent for him, before any action by the defendant, to waive the condition and rely upon having the note, or discharge,

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thereafter. And if Hoyt was satisfied with the defendant's taking the horse, it is sufficient.

5. The demand of the horse, after an *actual conversion* by the defendant by a *tortious taking* and *holding* for several months, though the defendant offered then to deliver him up, cannot affect the case, inasmuch as she refused to accept him. *Hart v. Skinner*, 16 Vt. 138.

The opinion of the court was delivered by

REDFIELD, J. 1. We think there is no doubt that the motion to dismiss the action for want of jurisdiction in the county court was correctly overruled. The case is the same, in principle, with that of *Ladd v. Hill*, 4 Vt. 164, and, in its facts, somewhat stronger than that case in favor of the jurisdiction of the county court.

2. We think the suit is well enough brought in the name of the plaintiff in her representative capacity. The administrator, under our statutes, which are much the same as the English Statute of 4 Edward III, c. 7, may sustain trover, either for a conversion during the life of the intestate, or, after the decease, either before or after administration granted. In the former case he must declare in his representative capacity, counting upon the possession and property of the intestate, or upon the administrator's seisin by relation, and in the two latter cases the suit may be in the name of the administrator as an individual merely, counting upon his naked possession, when he ever had such possession *in fact*; otherwise in all cases, when the property is in the estate, the declaration should be in the name of the administrator, as such. 1 Ch. Pl. 58-60. *Towle v. Lovet*, 6 Mass. 394. *Foster v. Gorton*, 5 Pick. 185. 28 E. C. L. 105. 1 Ad. & El. 354. Story's Conf. of Laws 433.

3. We do not think that the contract between Stephen Manwell and James Briggs, as detailed in the bill of exceptions, was sufficient to vest any interest in the note in Briggs, or in any thing which should be collected on the note, unless collected by him. The case of depositing a note with a third person, upon the terms that he have one half he can collect upon it, is not very uncommon, and is not understood to vest any interest in the note in such depositary, or as

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precluding the owner of the note from collecting it himself, if he have an opportunity.

4. As the testimony was, and as the case was put to the jury, we are to understand that the jury might have found, and probably did find, that the plaintiff took the horse before any contract was closed,—before she had performed the necessary conditions on her part. If so, it is settled law that no title would vest in her. 3 Stark. Ev. 1148 & note, citing *Bishop v. Shillito*, 2 B. & Ald. 329, note.

5. But the jury were told that this condition would be waived, if "Hoyt was afterwards *satisfied* to have her [the plaintiff] keep the horse, and he so informed the defendant, before the defendant directed him to take the horse." If by "*satisfied*" is meant a mere mental conclusion to waive the condition, and this not notified to any one, then it is not true that such a mental determination would affect the title of the property, which had been wrongfully taken by the plaintiff. If the plaintiff had done any act, in order to induce this waiver of the condition, or had been informed of it, and acted upon it, the waiver would then have become irrevocable;—but not so when it was a mere mental waiver, and was made known only to the defendant, or any other person not interested in the performance of the condition. This is the natural import of the word "*satisfied*," and the sense in which it was probably used to the jury.

But if we should construe the term as importing something beyond this,—as implying an express waiver of the condition, made known to the plaintiff,—there is still a difficulty in sustaining the case,—there being no evidence tending to show that any such fact existed. And if the plaintiff would get along with his case upon the ground that Hoyt had waived this condition in the sale, she must prove that fact; and a jury cannot be permitted to draw any such conclusion by mere conjecture. The important testimony upon this point, to which the jury were referred, was, that Hoyt told the defendant that "he had turned out the horse to the plaintiff on the note." We do not think this has any tendency to show that the contract of sale was closed by Hoyt's waiving the condition

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which was at first annexed to it. If Hoyt told the defendant that he had turned the horse out upon the note, it seems quite as probable that he told him upon what conditions, as that he omitted to state the conditions; and if we could suppose that he did omit to state the conditions, we should more naturally conclude that he had merely determined in his own mind not to insist upon the conditions, than that he had expressly so stipulated with the plaintiff. If this were the true state of the case, then Hoyt and the defendant would be without fault.

In regard to the conversion,—if there had been a tortious use, or taking, of the horse, which of itself amounted to a conversion, a subsequent demand would hardly amount to a waiver of such conversion. But the evidence of a conversion, which should result from a mere demand and refusal, would be very much affected by a subsequent demand and the defendant's then offering to surrender the property. It is upon this ground, if any, that the case of *Haywood v. Seward et al.*, 1 Moore & S. 459, [28 E. C. L. 269,] is to be justified. In that case the defendants had in their possession a boiler belonging to the plaintiffs, who demanded it, and the defendants at first refused to give it up, but afterwards, and before the issuing of the writ, tendered it to the plaintiffs,—and it was held no conversion.

Judgment reversed, and case remanded for a new trial.



NOAH PRESTON v. ERASTUS F. WHITCOMB.

[IN CHANCERY.]

To authorize a court of equity to reform a written instrument, on the ground of mistake, the evidence showing the mistake must be strong, and of a conclusive character.

Where arbitrators awarded that the orator should pay to the defendant a certain sum of money by a time specified, and that the defendant should, at the same time, execute to the orator a deed of certain premises, and the

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defendant, at the day, tendered to the orator the required deed, which the orator refused to accept, and the defendant thereupon commenced an action at law against the orator upon the award, and recovered judgment for the sum awarded to be paid to him and his costs, and afterwards the defendant sold and transferred the premises to a third person, receiving the value thereof, the court enjoined the defendant from any farther proceedings to enforce payment of the judgment recovered by him at law, and ordered that he repay to the orator the amount of a payment which the orator had made to him towards the land prior to the award, and which was taken into consideration by the arbitrators, and also that he pay the orator's costs. But the defendant was allowed to deduct, from the payment to be made by him, the amount of his costs in the suit at law,—the court holding that that judgment was rightly recovered, as the facts then were.

APPEAL from the court of chancery.

The allegations in the orator's bill, which it becomes material to detail, were, in substance, that, prior to March 13, 1837, the defendant had received from the orator a quantity of hay, and that a dispute had arisen between them relative to it,—the defendant claiming that the orator had agreed to purchase the defendant's title to a certain piece of land, and that the hay was delivered in part payment therefor; that on the 13th day of March, 1837, the parties agreed to submit their differences to the arbitrament of Edward Jones and Nathan Fay, jr.; that it was fully understood by the parties and the arbitrators that the latter were not to examine at all into the title of the defendant to the premises, but, if they awarded the conveyance at all, were to award the conveyance of a good title in fee; that the arbitrators went on and heard the parties, and made an award, appraising the premises at \$362,50, deducting therefrom the value of the hay, which they called \$85,14, and ordering the orator to pay to the defendant the balance, being \$277,36, by the first day of April, 1838, and that the defendant, on or before that day, should "well execute a good and authentic deed of conveyance" of the premises, and deliver the same, together with the possession of the premises, to the orator; that the arbitrators intended thereby to insure to the orator a conveyance of the title to the premises, and supposed that they had used terms in their award which would accomplish that purpose; that on the first day of April, 1838, the orator was ready to pay said sum of \$277,36,

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but that the defendant then tendered to him a deed, which, instead of conveying a good title to the premises, conveyed only such title as the defendant then had,—which the orator averred was invalid to hold the land; that the orator refused to accept the deed tendered, and brought an action at law to enforce performance of the award, in which action the Supreme Court decided that the deed tendered was all that was required by the terms of the award;* that the defendant then commenced an action at law against the orator, upon the award, to recover the sum which, by the award, the orator was to pay to him, and recovered judgment in said action at the January Term, 1841, of the Supreme Court in Chittenden County for \$340,22 damages and \$36,09 costs,† on which an execution was now outstanding against the orator; and that the defendant, subsequent to the recovery of that judgment, viz., on the 13th of January, 1841, by warrantee deed of that date, well executed, acknowledged and recorded, conveyed the same premises to Joseph Whipple and Iddo Green for the sum of \$362,50.

The orator prayed that the defendant might be ordered to perfect his title to the premises, and convey the same to the orator, according as the terms of the award were intended to be, or that he might be enjoined from pursuing to effect the judgment recovered by him in January, 1841.

The defendant answered, denying, in substance, that, “according to his belief,” there had been any mistake made by the arbitrators in the award, but admitting that he had deeded the premises to Whipple and Green, after the recovery of his judgment in January, 1841, as alleged in the bill.‡

*See the report of the case, *Preston v. Whitcomb*, 11 Vt. 47, in which the facts from which this case originated, and the construction which the Supreme Court gave to the award above referred to, are detailed at length.

†*Whitcomb v. Preston*, 13 Vt. 53.

‡Both the bill and answer were very voluminous; but the main object of the bill was to have the alleged mistake in the award corrected, and, as the court did not find the fact that any mistake had occurred, it becomes unnecessary to set forth the allegations any more fully than they are above detailed.

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The answer was traversed, and testimony was taken upon both sides, the material portions of which are detailed in the opinion of the court.

The court of chancery decreed that the defendant, his agents, &c., be perpetually enjoined from any proceedings to enforce collection of the judgment recovered by him in January, 1841, that he pay to the orator, by a time specified, \$85,14, (the price of the hay as found by the arbitrators,) with interest, and that he pay the orator's costs in this suit, deducting therefrom \$36,09, being the amount of costs recovered by him in the judgment which was enjoined.

C. D. Kasson for orator.

1. The only true question of fact, arising in this case, is this,—is the real judgment and intention of the arbitrators' correctly embodied in the instrument which they drafted? The Supreme Court have already given a construction to this instrument, and to the deed tendered in execution of it, to the effect that a warrantee deed, in the terms of the award, would only bind the warrantor to a defence of such portion of the land, as he had a title to,—which of course needs no warranty. The arbitrator Fay expressly swears that he intended to award an indefeasible title to the *whole* land, and that he supposed that he had done so. Jones, the other arbitrator, through much circuitry, comes to the same result.

Mistake is one of the peculiar grounds of chancery jurisdiction; and where it has been the mistake of a draftsman, as here, whether of law, or of fact, equity always relieves. *Hunt v. Rousmanier*, 8 Wheat. 174. *S. C.*, 1 Pet. 1. *Thomas v. Frazer*, 3 Ves. 399. *Joynes v. Statham*, 3 Atk. 357. *Underhill v. Horwood*, 10 Ves. 227. *Atkins v. Dick*, 14 Pet. 114.

2. The defendant confesses, in his answer, the fraud charged in the bill, in his conveyance of the land to Whipple and Green the 13th of January, 1841; so that, admitting the contract to have been proved as contended for by the defendant, he has rendered himself unable to perform it by his own *wrongful act*, and no decree can be made by this court to compel execution of it. It follows, hence, that the defendant has the orator's property, the hay, and *cannot*

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and will not yield the *quid pro quo* agreed upon, and it only remains for this court to decree payment for the hay in money, and perpetually enjoin the defendant from proceeding to collect from the orator payment for the land, for which he has himself received payment from a third person.

Hyde & Peck and Briggs & Underwood for defendant.

1. The mistake complained of is not a mistake of *fact*, but a mistake of *law*, from which a court of equity cannot relieve. *Bank of U. S. v. Daniel et al.*, 12 Pet. 32-55. The arbitrators used precisely the language they intended,—and the construction and legal effect of a writing is a matter of law. 1 Story's Eq. 121. 1 Fonbl. Eq. B. 1, c. 2, § 7, note. The rule is more strict against correcting *errors*, than contracts. 6 Pet. Cond. R. 382. But, if a mistake alone is ground of relief, the proof must be strong and irrefragable. Lord Thurlow, in *Shelburne v. Inchiquin*, 1 Bro. C. C. 247. 1 Story's Eq. 169. 2 Ib. 679.

2. The judgment at law in favor of this defendant furnishes no ground for relief in this court. That action was upon the arbitration bond, and the judgment recovered was for damages for *non performance*. The rule of damages, when the plaintiff has advanced the consideration, is the value of the act to be done, or of the thing to be delivered by the defendant; but when, as in this case, the plaintiff *has not advanced the consideration*, the rule is different, being the difference between the contract price and the value of the thing at the time of the breach, (unless special damage be shown,) leaving each party the *owner* of the thing *stipulated upon his part*. The recovery is not the price, but a compensation in damages for non-performance; and the judgment is conclusive that it was rendered only for *just damages* for non-performance. *Hopkins v. Lee*, 5 Pet. Cond. R. 23. *Wells v. Abernethy*, 5 Conn. 222. *Clark v. Pinney*, 7 Cow. 681. *Dey v. Dox*, 9 Wend. 129.

It follows that the court cannot decree the land to the orator, because, as we have seen, the damages are assessed upon the hypothesis that the vendor keeps the property; they cannot decree the price of it, for the same reason; for the same reason they cannot enjoin the judgment, without directly impeaching it. *Bank of U. S. v. Daniel et al.*, 12 Pet. R. 32. 1 Story's Eq. 129.

Preston v. Whitcomb.

The opinion of the court was delivered by

BENNETT, J. The primary object of this bill is to reform an award of arbitrators, and make it different from what it is upon its face, or entirely to set it aside, and grant relief according to what is claimed to be the inherent equities of the parties.

We have no occasion to pass upon the question, whether a court of equity has power to correct a mistake in law, unaccompanied with other grounds of relief, and, if so, whether the principle should be extended to awards of arbitrators. The evidence, in this case, to show any mistake in drawing up the award, in regard to its legal effect, is unsatisfactory. To authorize a court of equity to reform a written instrument upon the ground of mistake, the evidence showing the mistake must be strong and of a conclusive character; and it has sometimes been said, it must be *irrefragable*. But, in the present case, it seems, that, by the original agreement of the parties, Preston was to give \$362.50, (the sum awarded) and risk the title; and we do not learn that there was any controversy before the arbitrators about the title, or the price to be paid for it. The effect, as given to the award at law, carried out the original agreement of the parties. See 11 Vt. 47.

Very little can be made out of the testimony of Jones, going to show a *mistake*; and though the testimony of the other arbitrator is a little more to the point, yet it stands opposed to the original agreement of the parties, and opposed to the award itself; and the defendant, according to his belief, denies in his answer that there was any mistake as to the legal effect of the award. The parties must, then, at all events in this case, stand upon the award, as made and published;—and if there had been nothing farther in the case, the bill should be dismissed with costs.

But it seems, that, after Whitcomb had recovered a judgment against Preston for the sum awarded to be paid him for the land, less the value of the hay, which he had before received, he sold and deeded the land to another person. The defendant, then, has received pay for the land, which in equity would belong to the plaintiff, upon his payment of the purchase money. The judgment, which is sought to be enjoined, it is clear, was given for the sum awarded for the land, and the interest, after deducting the hay;

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See *Whitcomb v. Preston*, 13 Vt. 53. The defendant should not be permitted to retain the avails of the land, and still collect his judgment.

It is now said by the defendant's counsel that the rule of damages at law was wrong, and that he was only entitled, in effect, to nominal damages. So far as it respects this case, it is a matter of little account, as it seems to me, whether the rule of damages adopted by the court was strictly correct, or not. The plaintiff, in that suit, elected to take his damages, in point of fact, for the sum awarded by the arbitrators, and if this was wrong, it furnishes no good reason why he should retain the benefit of this judgment, and still hold the avails of the land besides. But we think the rule adopted was the correct one. The plaintiff in that case had, in legal effect, performed the award on his part, by his having executed and tendered to the defendant such a deed as the award required, accompanied, also, with a tender of the possession. The result is, that the decree of the chancellor must be affirmed with additional costs.

The present defendant's costs in the suit upon the award were rightly deducted by the decree of the chancellor from the orator's costs in this suit. That judgment was rightfully recovered, both the damages and costs; and no reason has since intervened why the costs should not be paid. The cause is remitted to the chancellor accordingly, with instruction that he modify the decree only as to the time when the money decreed to be paid to the orator shall be payable.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF FRANKLIN.

JANUARY TERM, 1845.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE,
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. WILLIAM HEBARD, }

NATHANIEL HILL AND WIFE v. JOHN S. ROYCE.

If the husband appoint an attorney to receive the money upon his wife's *chose in action*, and the attorney actually receive the money, the wife cannot join with the husband in a suit to recover the money from the attorney, but the husband must sue alone.

ASSUMPSIT for money had and received. Plea, the general issue.

On trial, the plaintiffs gave in evidence a receipt, executed by the defendant, which recited that the defendant had received of the plaintiff Nathaniel Hill "a note held by himself and wife,"—describing it,—from which, when collected, the defendant was to deduct the amount of a debt due from the plaintiffs to him, and

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concluding as follows;—" And I hereby agree to account to said Hill for the remainder of said note, when collected, after paying my debt against said Hill and his wife, as aforesaid." The plaintiffs also offered to prove, and the defendant conceded, that the note mentioned in the said receipt was the sole property of the said Hill's wife, previous to her marriage to said Hill, and that the money due upon said note had been collected and received by the defendant, and was in his hands at the time this action was commenced.

From these facts the court decided that the action should have been brought in the name of Nathaniel Hill alone, and that his wife could not join with him as plaintiff in the action. Exceptions by plaintiffs.

H. R. & J. J. Beardsley for plaintiffs.

1. The receipt furnishes no evidence that the husband had reduced his wife's *chose in action* to possession, so as to divest her of all interest in it, or in the money collected thereon in the hands of the defendant. The taking the receipt was not the substitution of a new security, merging the note, but was rather collateral to the note, the note still remaining the property of the husband and wife while in the hands of the defendant for security and collection.

2. The defendant was the agent of the husband and wife, and was acting in reference to their joint interest; and his receipt of the money would not divest the wife's interest, unless the husband, by some unequivocal act, had indicated that the wife's claim should cease immediately upon the payment of the money into the hands of the agent. 2 Kent 142. 9 Vt. 320. 10 Vt. 446. *Whitaker v. Whitaker*, 6 Johns. 111. The whole case, so far from showing any such intention on the part of the husband, evinces rather a design on his part to preserve his wife's interest. This is conclusively shown by the fact that he joined her with himself in this suit.

3. Under the circumstances it was optional on the part of the husband to regard the wife's *chose in action* as reduced to his possession, or not, as he chose. By preserving her interest, as was manifestly his design, he was only doing what a court of equity would direct, in cases bearing a strong analogy to this. In this view of the case the husband has a right to elect whether the action

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shall be brought in his own name, or jointly with his wife; and, whatever his election may be, the defendant has no reason to complain, as he can in no way be prejudiced by the choice. 1 Ch. Pl. 17. Arch. Pl. 41-2. 2 Saund. Pl. & Ev. 69, 70, and cases there cited. *Stanwood v. Stanwood*, 17 Mass. 57. 16 Mass. 480. *Richardson v. Daggett*, 4 Vt. 336.

A. O. Aldis and Smalley, Adams & Hoyt for defendant.

1. If the husband impower another to receive the money due on a *chose in action*, which belonged to the wife before marriage, and he receive it, although it do not come to the hands of the husband, it is held to be a reducing of it to his possession. Ham. on Parties 195. Reeve's Dom. Rel. 4. 2 Kent 137. Bingh. on Cov. 209. 1 Bac. Abr. 289. *Schuyler v. Hoyle*, 5 Johns. Ch. R. 196. 4 Petersd. 27 & note.

2. The contract between the defendant and the husband amounted to an assignment of the debt to the defendant for a valuable consideration, and an agreement between the defendant and the husband alone, for a valuable consideration, to account to *the husband alone* for a part. In such case the husband must sue alone. 1 Ch. Pl. 32.

The opinion of the court was delivered by

REDFIELD, J. We think there was no right of action in the plaintiffs at the time the suit was brought. Whatever will destroy absolutely the wife's right of survivorship will preclude her being joined in the action to recover her *choses in action*;—as if there be a new security given to the husband alone, or any other contract made with the husband, by which the former contract is merged. It is said in the elementary books, too, that, if the husband assign the wife's *chose in action* for a valuable consideration, this will destroy her right of survivorship. 2 Kent 136.

In the case of *Schuyler v. Hoyle*, 5 Johns. Ch. R. 196,—which is a very well considered case, and in chancery, where the rights of the wife are viewed quite as favorably as at law,—it is said, “that, if the husband appoint an attorney to receive the wife's money, due upon her *chose*, and he receive the money,” or if the husband assign

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the wife's *chose* absolutely,—which has since been questioned,—or if he recover it by a suit at law in his own name,—which he could not ordinarily do, unless by consent of the debtor,—or if he release the debt, the right of survivorship in the wife is gone.

But, without going much into all these propositions, it is well settled, I think, that, if the husband appoint an attorney, who collects the money upon the wife's *chose*, her right of survivorship is gone, and she cannot join in a suit to recover the money from the attorney. The effect of the husband's assigning, or mortgaging, her *chose* is more questionable, in regard to the wife's right of survivorship before the money is actually received. But the former proposition disposes of this case. The money in the defendant's hands was the money of the husband, and he alone can sue for it. 1 Chit. Pl. 19.

Judgment affirmed.



SAMUEL B. HURLBURT v. RICHARD HICKS AND JOHN GOODSSELL,
and HARMON WOODRUFF AND H. R. & J. J. BEARDSLEY, Trustees.

Where one summoned as trustee is adjudged trustee by the county court, the principal debtor in the case may file and prosecute exceptions to such decisions.

A deputy sheriff, who has received an execution for collection, and who has, during its life, collected the money due upon it, may be held as trustee of the execution creditor for the amount so collected, if he have it in his hands at the time of the service of the trustee process upon him; and his liability is not affected by the fact that the execution creditor has never demanded of him payment of such money.

An attorney, who has a demand in his hands for collection at the time of the service of trustee process upon him as trustee of his client, for whom he holds the demand, may be held as trustee of the client, if he collect the money upon the demand after such service, but previous to the making his disclosure.

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1. The policy of our law is to subject the whole estate of the debtor, whether real or personal, whether in possession, or in action, to the process of law to enforce the payment of his debts. *Trombly et al., v. Clark*, 13 Vt. 118. *Hutchins v. Hawley*, 9 Vt. 295. Rev. St. 190, §§ 1, 4, 34. Ib. 194, § 33.

2. Woodruff was indebted to the defendant Hicks for the money in his hands at the time of the service of the trustee process upon him, and Hicks had then a right to demand and receive it, and, on neglect, or refusal, might maintain an action of assumpsit against him for it. *Conant v. Bicknell*, N. Chip. Rep. 66. *Eastman v. Curtis*, 4 Vt. 616. *Hitchcock v. Egerton*, 8 Vt. 202. *Denton v. Livingston*, 9 Johns. 96. 2 Phil. Ev. 377, 390.

3. As the trustee statutes are remedial, and intended to enlarge the rights of the creditor to reach the effects and credits of his debtor, and to restrict his remedy by arrest, they ought to be liberally and beneficially construed.

The opinion of the court was delivered by

WILLIAMS, CH. J. In this case the trustees were adjudged chargeable on their disclosures. It appears that Woodruff had, as deputy sheriff, collected on execution in favor of Hicks, one of the defendants in this action, an amount, for which the county court adjudged him trustee of Hicks. The execution, on which he collected the money, bore date September 27, 1843, and was returnable in sixty days; he collected the money within the life of the execution; and the writ in the present case was served on him, as trustee, on the 29th day of November, 1843.

The principal debtor excepts to the decision of the county court; and it is objected, that, inasmuch as Woodruff, the trustee, did not except to the decision of the court below, the judgment should be affirmed. It appears to us, however, that the principal debtor, whose interest is affected by the proceeding, and who has been interfered with in the collection of his executions in the hands of the deputy sheriff, may save any question arising on the disclosure of the trustee, and show any good cause why his debts and contracts should not be interfered with.

On the question raised on the disclosure of Woodruff we have

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no doubt the decision of the county court was correct. It is sufficient, if the trustee has any credits of the principal debtor in his hands, or is indebted to him absolutely, and not depending on any contingency. A sheriff, having collected money on an execution, is so indebted to the creditor, for which the creditor may maintain an action against him for money had and received. It was so decided in the case of *Dale v. Birch et al*, sheriffs of London, 3 Campb. 346, and in the case of *Longdill v. Jones*, 1 Stark. R. 345, and that such action could be maintained against the sheriff, even without a previous demand.

These decisions are directly opposed to the case of *Wilder v. Bailey & Tr.*, 3 Mass. 289. The latter case, it is true, is supported by very ingenious reasoning; but we apprehend, that, under the statute of this State, which subjects every person to this process having any goods, effects, or credits of the principal debtor intrusted, or deposited, in his hands, or possession, the case in Massachusetts cannot be received as an authority to control the construction of the statute. The preamble of the statute in Massachusetts was much relied on in the opinion of the court; no such preamble exists in our statute, but all the credits of the debtor are subject to be taken on this process.

It is not material for us to consider whether an action for money had and received could be maintained against the officer by the creditor in the execution, without a previous demand, as was decided in the case of *Dale v. Birch et al*, 3 Campb. 346. It is sufficient to say that the officer has credits of the principal debtor in his hands, which may be arrested, or stayed, by the trustee process; and that he has such credits we have no doubt.

It is worthy of observation, that, when the committee of revision reported to the legislature the statute in relation to the trustee process, they, in the 29th section, incorporated a provision, "that no person should be adjudged a trustee by reason of any money, or other thing, received or collected by him as a sheriff, or other officer, by force of an execution, or other legal process, in favor of the principal defendant in the trustee process, although the same should have been previously demanded of him by the principal defendant, or by reason of any money in his hands as a public officer,

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1. The policy of our law is to subject the whole estate of the debtor, whether real or personal, whether in possession, or in action, to the process of law to enforce the payment of his debts. *Trombly et al., v. Clark*, 13 Vt. 118. *Hutchins v. Hawley*, 9 Vt. 295. Rev. St. 190, §§ 1, 4, 34. *Ib.* 194, § 33.

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'and for which he is accountable merely as such officer to the 'principal defendant,'—both of which provisions were stricken out before the present act was passed,—the legislature not considering it expedient to engraft such an exception upon the statute.

The judgment of the county court is therefore affirmed.



HARMON W. BULLARD v. RICHARD HICKS AND JOHN GOODSSELL,
and H. R. & J. J. BEARDSLEY AND HARMON WOODRUFF, Trustees.

A deputy sheriff held chargeable as trustee for money collected by him on execution, as in *Hurlburt v. Hicks et al. & Tr.*, ante page 193.

One summoned as trustee, who discloses a sum of money in his hands belonging to the principal debtor, but that he has been adjudged chargeable as trustee for the same sum in a prior suit against the debtor, must be discharged, and his costs must be taxed against the plaintiff in the suit, and not be deducted from the amount found in his hands.

TRUSTEE PROCESS. The disclosures in this case were the same as in the case in favor of Samuel B. Hurlburt against the same defendants and the same trustees, *ante* page 193, except that the trustees H. R. & J. J. Beardsley now disclosed that they had been adjudged trustees in that suit for the whole amount in their hands, viz. \$130, and that the said sum was insufficient to satisfy the plaintiff's claim in that suit.

The county court rendered judgment against the trustees, upon their disclosures; to which decision the trustees excepted.

The opinion of the court was delivered by

WILLIAMS, Ch. J. The principal questions in this case have been decided in the case in favor of Hurlburt against the same defendants and their trustees. But with respect to the Messrs. Beardsley there is this difference, that the amount disclosed by them is not sufficient to pay the amount for which Hurlburt recovered judgment

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against them in that suit, the writ in which was served prior to the service of the writ in this case. They cannot, therefore, be called upon by this plaintiff, only on the contingency that Hurlburt should be able to collect the whole amount of his judgment against the principal debtor without recourse to them. They must, therefore, be entitled to their costs, to be adjudged to them against this plaintiff.

The cost which accrued to them in this suit should not be deducted from the amount found due to Hicks and Goodsell, as this would lessen the sum for which the first creditor, Hurlburt, has a just claim against them. They were rightly adjudged trustees in this suit, subject to their liability as trustees of the same debtors in the suit in favor of Hurlburt; and the judgment of the court below is affirmed in this particular;—but judgment must be rendered for these trustees to recover their cost.



PHELPS SMITH v. JONATHAN M. BLAISDELL AND JULIUS HOYT.

[IN CHANCERY.]

In the case of a bond, conditioned that the obligor shall execute to the obligee a deed of certain premises upon payment, by a day named, of a specified sum of money and the interest thereon, it being understood between the parties before and at the time of the execution of the bond that the obligee had an equitable interest in the premises, and a right to redeem them: by payment of the amount of the obligor's interest in them, and the obligee remains in possession of the premises, paying no rent, and he neglects to make the payment by the day named in the bond, a court of chancery will allow him to redeem by payment at a subsequent day, upon application made in proper season.

But if the obligee, having failed to make payment by the day named in the bond, surrender the possession of the premises to the obligor, and neglect to bring his bill to redeem for nearly six years, the court will grant no relief.

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Where to a clause for re-entry, in a lease, for non-payment of rent, there is attached a condition that the landlord shall, before entering, give to the tenant in arrear thirty days notice, the landlord has no right to re-enter, unless he give such notice. The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reserved by deed, and all the conditions, or stipulations, annexed thereto must be strictly followed.

Where, in such case, the tenant conveys his interest in the premises to a third person, but still retains the possession, a judgment obtained against him by the landlord in an action of ejectment for non-payment of rent, obtained without giving any notice to the grantee of the tenant, can have no effect, as against such grantee; nor will any subsequent lease, or deed, executed by the landlord, convey any legal title as against him.

But where the grantee of the tenant, in such case, permitted the tenant to retain the possession of the premises, and the tenant, by means of such possession, obtained a credit with the defendant, and procured the lessor to convey the premises to the defendant by perpetual lease, and the defendant executed to the tenant a bond, conditioned for the conveyance of his title to the tenant on payment of a certain sum by a day named, and the tenant, failing to make payment by the day named in the bond, surrendered the possession of the premises to the defendant, who entered, and retained the possession, claiming an absolute right thereto by virtue of the lease to him from the landlord, and the orator, who was assignee of the tenants bond, and who had also purchased the title of the tenants grantee, brought his bill to assert his right within six years from the time the defendant took possession of the premises, the court held that his right was not affected by the lapse of time, but that they would not allow him to redeem, without payment to the defendant of the sum originally advanced to the tenant by the defendant upon the credit of the premises, as specified in the condition of the bond; and the court refused to compel the defendant to account for the rents and profits during the time he had been in possession, and also refused to allow him interest upon his money during that time.

And this relief was granted to the orator, notwithstanding the deed from the tenant's grantee to the orator was executed at a time when the defendant was in adverse possession of the premises, claiming title thereto by virtue of his lease.

In this case the court refused to allow costs to the defendant,—he having contested the orator's right to redeem,—and they also refused to allow costs to the orator, as he had not, before bringing his bill, actually tendered to the defendant the amount due to him.

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THIS was a bill brought to redeem certain premises by payment of the incumbrance upon them, or to set aside the proceedings by which the incumbrance was created.

The orator set forth in his bill that one Jotham Bush, on the 7th day of April, 1808, conveyed to William Nason, by perpetual lease, fifty acres of land in St. Albans, reserving an annual rent of \$6,25, the lessee paying all taxes, which lease contained a clause giving to the lessor the right of re-entry in case two years' rent should be unpaid at the same time,—the lessor giving to the tenant in arrear thirty days notice in writing before re-entering; that William Nason died in 1810, leaving a will, by which he devised to his wife, Mary Nason, an estate during her natural life, and so long as she should continue a widow, in his home farm, which comprised a portion of the said fifty acres, and to Asa Lock and his wife the residue of the said fifty acres during their natural lives, and by which all the said premises, after the termination of the said life estates, were to belong to John Nason; that the said Mary Nason took possession of that portion of the said premises devised to her, and retained possession thereof until her death, which was in 1829; that, on the 18th day of November, 1820, the estate of Asa Lock and his wife in that portion of the premises devised to them became vested in one Eleazor W. Hickok, who received the conveyance thereof as trustee of the said John Nason; and that said Hickok died in 1823, leaving his mother, Betsey Ainsworth, his heir at law.

The orator farther set forth that the said John Nason, on the 21st day of July, 1820, conveyed, by quitclaim deed, all his interest in the said fifty acres, for a valuable consideration, to his sisters, Sally Morrill, Polly Ryan, Peggy Nason and the said Betsey Ainsworth; that in 1827, there then being about \$35 of the rent of the said fifty acres in arrear and unpaid, the said Bush commenced an action of ejectment against John Nason, who was then, as tenant to Mary Nason, in possession of that portion of the said fifty acres which had been devised to said Mary; which action was entered at the April Term of Franklin county court in 1827, and was continued to the September Term of the same year; that, during the pendency of said action, John Nason, either for the purpose of defeating the title which he had conveyed to his sisters, as above mentioned, or

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to raise money for his own use, proposed to said Bush that he would consent to a judgment against him in said action, and would pay the rent in arrear upon said premises, and the cost of suit, provided said Bush would execute to him, or to such person as he should appoint, a new lease of said premises, at a rent of \$6,50 per year ; and that this proposition was acceded to by Bush, and a judgment rendered in his favor in pursuance thereof, in said action, at the said September Term 1827, and that the rent in arrear and the costs of the action were paid by said John Nason.

The orator farther alleged, that, the said John Nason having agreed with one Israel P. Richardson to advance to him \$140 and take a lease of said premises as security therefor, the said Bush, in pursuance of the agreement between him and Nason, executed to said Richardson, his heirs and assigns forever, a lease of said premises, reserving an annual rent of \$6,50 ; that it was fully understood between Nason and Richardson that the advance by the latter was merely a loan, and that he should hold the said lease only as security for the re-payment thereof and the interest thereon, and that, upon such re-payment, he should convey said premises to Nason, or to such person as Nason should appoint, and that Nason should retain possession of the premises, paying the rent to Bush, and the taxes thereon ; and that afterwards, Richardson calling for payment of the money advanced by him, Nason made an arrangement with one John Smith, by which Smith advanced to Nason \$300 upon the promise of Richardson that he would execute to him, Smith, a quitclaim deed of said premises as security for the re-payment of said sum,—which sum was in part employed by Nason in repaying to Richardson the money which had been previously advanced by him.

The orator farther alleged, that, in August, 1833, Nason, through the agency of the said Smith, applied to the defendant Blaisdell and requested him to loan to Nason \$375, being the amount then due to Smith for the sum advanced by him and the interest thereon, and receive, as security therefor, a quitclaim deed of the said premises from Richardson, and also a quitclaim deed from Nason, and execute to Nason a bond, conditioned to re-deed to Nason the premises, upon payment of the said sum of \$375 with the interest there-

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on; that the defendant assented to this proposition, and, on the 20th day of August, 1833, Richardson executed a quitclaim deed of the premises, and delivered the same to Smith, as his agent; that, in pursuance of the same agreement, Nason, on the 7th day of September, 1833, executed to the defendant a quitclaim deed of the same premises, with the express understanding that this deed, as well as the deed from Richardson, when delivered, should be held by the defendant only as security for the re-payment of the said sum of \$375 and the interest thereon; that on the same day, and in order to effectuate and carry out this understanding, the defendant executed his bond to the said Nason, bearing date August 20, 1833, by which he bound himself, on payment by the said Nason, by the first day of April, 1834, of the said sum of \$375 and the interest, to execute and deliver to Nason, on demand thereafter, a good and valid quitclaim deed of the said premises; that on the same day the deeds from Richardson and Nason were delivered to the defendant, and the bond from the defendant was delivered to Nason; that, as part of the same arrangement, Nason retained the possession of the premises, and paid the rents and taxes thereon, until April 1st, 1834; and that on the first day of April, 1834, the defendant, as mortgagor, claiming by virtue of the aforesaid deeds, entered into possession of said premises, and still retained the same.

The orator farther alleged that he, on the 6th day of May, 1836, having purchased the William Nason home farm, to which the said fifty acres had always been attached, and being ignorant of the conveyance of the said fifty acres from John Nason to Sally Morrill, Polly Ryan, Peggy Nason and Betsey Ainsworth, and supposing that John Nason had an undoubted right, as mortgagor, to redeem the said fifty acres by paying to the defendant the amount due to him for his advances to Nason, purchased of said Nason his interest in the premises for a valuable consideration, and the said Nason then executed to him a quitclaim deed of said premises, and also an assignment, in due form, of the bond from the defendant to said Nason, and delivered the said deed and bond to the orator; that afterwards, having ascertained that John Nason had before conveyed the premises to the said Sally Morrill, Polly Ryan, Peggy Nason and Betsey Ainsworth, the orator purchased in their title, for

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TRUSTEE PROCESS. The trustee Woodruff disclosed that he was a deputy sheriff, and as such received for collection two executions upon judgments rendered in favor of the defendant Hicks, and that he collected the amount due thereon during the life of the executions, being in the whole \$459,27, and that he held that sum in his hands, belonging to the said Hicks, at the time of the service of the writ in this action upon him. The judgments, on which said executions were issued, were rendered by Franklin county court, at the September Term, 1843, the executions were dated September 27, 1843, and were made returnable in sixty days, and the writ in this action was served upon the trustee the 29th day of November, 1843.

The trustees H. R. & J. J. Beardsley disclosed that they, as attorneys for the said Hicks, commenced a suit against Samuel B. Hurlburt, sometime previous to the service of this trustee process upon them, on a note due from said Hurlburt to said Hicks, and that, some time after the service of this trustee process upon them, they had collected the amount due upon said note, being \$130, which sum they still held.

The court, upon these disclosures, adjudged the said Woodruff and the said H. R. & J. J. Beardsley trustees for the amounts specified in their respective disclosures; to which decisions the principal debtors excepted.

H. R. & J. J. Beardsley for defendants.

The statute allowing the trustee process is manifestly an interference with the original common law rights and remedies of contracting parties, and should receive a strict construction, and in no case be extended beyond the objects obviously intended by the legislature. We contend, then, that money, thus received by an officer, is not "goods, effects, or credits of the principal defendant, intrusted or deposited with him," within the meaning of the trustee statute.

1. It is evidently not *goods*, or *effects*, of the principal defendant, unless the identical money, received by the officer, is the property of the execution creditor; and this cannot be, because money is not susceptible of ownership in specie, while in the hands of a third person. *Turner v. Findall*, 1 Pet. Cond. Rep. 261.

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2. In order to make this money a *credit* in the hands of the officer, there must be the relation of debtor and creditor between the officer and the principal defendant. But this cannot be; for the officer is the mere minister of the law, to enforce the payment of the judgment by means of the execution in his hands; he is in no way the agent of the execution creditor, and the money, when collected by him, is in the custody of the law. In this case the trustee is a deputy sheriff. He is guilty of no breach of duty, in not paying over the money, until the life of the execution has expired. If he then neglect to pay over the money, the execution creditor must bring his action, not against the deputy, but against the sheriff.

But again, granting that the law would imply a promise on the part of the officer to pay the money, which the execution creditor could enforce against him personally,—when will the law raise this promise, and give the creditor a right of action for a breach of it? Clearly not until the creditor has demanded the money. Hence there is no point of view in which this money can be regarded as a credit.

3. Neither was the money “intrusted, or deposited, in the hands, or possession” of the officer. The creditor intrusted with him the execution,—but the execution debtor deposited the money with him. *Wilder v. Bailey & Tr.*, 5 Mass. 289. *Pollard v. Ross & Tr.* Ib. 319.

4. To hold that a sheriff, or other ministerial officer, having money in his hands collected upon an execution, may be summoned and held as the trustee of the judgment creditor is against sound policy, and will open a door for fraud and collusion between the debtor and officer.

Smalley, Adams & Hoyt for plaintiff.

I. The suit should be dismissed, as the trustees did not except to the decision of the county court, and the defendants have no right to except for them.

II. But, if the defendants can except to the decision of the county court, we insist that the judgment of the court should be affirmed.

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1. The policy of our law is to subject the whole estate of the debtor, whether real or personal, whether in possession, or in action, to the process of law to enforce the payment of his debts. *Trombly et al., v. Clark*, 13 Vt. 118. *Hutchins v. Hawley*, 9 Vt. 295. Rev. St. 190, §§ 1, 4, 34. *Ib.* 194, § 33.

2. Woodruff was indebted to the defendant Hicks for the money in his hands at the time of the service of the trustee process upon him, and Hicks had then a right to demand and receive it, and, on neglect, or refusal, might maintain an action of assumpsit against him for it. *Conant v. Bicknell*, N. Chip. Rep. 66. *Eastman v. Curtis*, 4 Vt. 616. *Hitchcock v. Egerton*, 8 Vt. 202. *Denton v. Livingston*, 9 Johns. 96. 2 Phil. Ev. 377, 390.

3. As the trustee statutes are remedial, and intended to enlarge the rights of the creditor to reach the effects and credits of his debtor, and to restrict his remedy by arrest, they ought to be liberally and beneficially construed.

The opinion of the court was delivered by

WILLIAMS, CH. J. In this case the trustees were adjudged chargeable on their disclosures. It appears that Woodruff had, as deputy sheriff, collected on execution in favor of Hicks, one of the defendants in this action, an amount, for which the county court adjudged him trustee of Hicks. The execution, on which he collected the money, bore date September 27, 1843, and was returnable in sixty days; he collected the money within the life of the execution; and the writ in the present case was served on him, as trustee, on the 29th day of November, 1843.

The principal debtor excepts to the decision of the county court; and it is objected, that, inasmuch as Woodruff, the trustee, did not except to the decision of the court below, the judgment should be affirmed. It appears to us, however, that the principal debtor, whose interest is affected by the proceeding, and who has been interfered with in the collection of his executions in the hands of the deputy sheriff, may save any question arising on the disclosure of the trustee, and show any good cause why his debts and contracts should not be interfered with.

On the question raised on the disclosure of Woodruff we have

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no doubt the decision of the county court was correct. It is sufficient, if the trustee has any credits of the principal debtor in his hands, or is indebted to him absolutely, and not depending on any contingency. A sheriff, having collected money on an execution, is so indebted to the creditor, for which the creditor may maintain an action against him for money had and received. It was so decided in the case of *Dale v. Birch et al*, sheriffs of London, 3 Campb. 346, and in the case of *Longdill v. Jones*, 1 Stark. R. 345, and that such action could be maintained against the sheriff, even without a previous demand.

These decisions are directly opposed to the case of *Wilder v. Bailey & Tr.*, 3 Mass. 289. The latter case, it is true, is supported by very ingenious reasoning; but we apprehend, that, under the statute of this State, which subjects every person to this process having any goods, effects, or credits of the principal debtor intrusted, or deposited, in his hands, or possession, the case in Massachusetts cannot be received as an authority to control the construction of the statute. The preamble of the statute in Massachusetts was much relied on in the opinion of the court; no such preamble exists in our statute, but all the credits of the debtor are subject to be taken on this process.

It is not material for us to consider whether an action for money had and received could be maintained against the officer by the creditor in the execution, without a previous demand, as was decided in the case of *Dale v. Birch et al*, 3 Campb. 346. It is sufficient to say that the officer has credits of the principal debtor in his hands, which may be arrested, or stayed, by the trustee process; and that he has such credits we have no doubt.

It is worthy of observation, that, when the committee of revision reported to the legislature the statute in relation to the trustee process, they, in the 29th section, incorporated a provision, "that no person should be adjudged a trustee by reason of any money, or other thing, received or collected by him as a sheriff, or other officer, by force of an execution, or other legal process, in favor of the principal defendant in the trustee process, although the same should have been previously demanded of him by the principal defendant, or by reason of any money in his hands as a public officer,

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‘and for which he is accountable merely as such officer to the ‘principal defendant,’—both of which provisions were stricken out before the present act was passed,—the legislature not considering it expedient to engraft such an exception upon the statute.

The judgment of the county court is therefore affirmed.



HARMON W. BULLARD v. RICHARD HICKS AND JOHN GOODSSELL,
and H. R. & J. J. BEARDSLEY AND HARMON WOODRUFF, Trustees.

A deputy sheriff held chargeable as trustee for money collected by him on execution, as in *Hurlburt v. Hicks et al. & Tr.*, *ante* page 193.

One summoned as trustee, who discloses a sum of money in his hands belonging to the principal debtor, but that he has been adjudged chargeable as trustee for the same sum in a prior suit against the debtor, must be discharged, and his costs must be taxed against the plaintiff in the suit, and not be deducted from the amount found in his hands.

TRUSTEE PROCESS. The disclosures in this case were the same as in the case in favor of Samuel B. Hurlburt against the same defendants and the same trustees, *ante* page 193, except that the trustees H. R. & J. J. Beardsley now disclosed that they had been adjudged trustees in that suit for the whole amount in their hands, viz. \$130, and that the said sum was insufficient to satisfy the plaintiff's claim in that suit.

The county court rendered judgment against the trustees, upon their disclosures; to which decision the trustees excepted.

The opinion of the court was delivered by

WILLIAMS, Ch. J. The principal questions in this case have been decided in the case in favor of Hurlburt against the same defendants and their trustees. But with respect to the Messrs. Beardsley there is this difference, that the amount disclosed by them is not sufficient to pay the amount for which Hurlburt recovered judgment

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against them in that suit, the writ in which was served prior to the service of the writ in this case. They cannot, therefore, be called upon by this plaintiff, only on the contingency that Hurlburt should be able to collect the whole amount of his judgment against the principal debtor without recourse to them. They must, therefore, be entitled to their costs, to be adjudged to them against this plaintiff.

The cost which accrued to them in this suit should not be deducted from the amount found due to Hicks and Goodsell, as this would lessen the sum for which the first creditor, Hurlburt, has a just claim against them. They were rightly adjudged trustees in this suit, subject to their liability as trustees of the same debtors in the suit in favor of Hurlburt; and the judgment of the court below is affirmed in this particular;—but judgment must be rendered for these trustees to recover their cost.



PHILIPS SMITH v. JONATHAN M. BLAISDELL AND JULIUS HOYT.

[IN CHANCERY.]

In the case of a bond, conditioned that the obligor shall execute to the obligee a deed of certain premises upon payment, by a day named, of a specified sum of money and the interest thereon, it being understood between the parties before and at the time of the execution of the bond that the obligee had an equitable interest in the premises, and a right to redeem them by payment of the amount of the obligor's interest in them, and the obligee remains in possession of the premises, paying no rent, and he neglects to make the payment by the day named in the bond, a court of chancery will allow him to redeem by payment at a subsequent day, upon application made in proper season.

But if the obligee, having failed to make payment by the day named in the bond, surrender the possession of the premises to the obligor, and neglect to bring his bill to redeem for nearly six years, the court will grant no relief.

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Where to a clause for re-entry, in a lease, for non-payment of rent, there is attached a condition that the landlord shall, before entering, give to the tenant in arrear thirty days notice, the landlord has no right to re-enter, unless he give such notice. The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reserved by deed, and all the conditions, or stipulations, annexed thereto must be strictly followed.

Where, in such case, the tenant conveys his interest in the premises to a third person, but still retains the possession, a judgment obtained against him by the landlord in an action of ejectment for non-payment of rent, obtained without giving any notice to the grantee of the tenant, can have no effect, as against such grantee; nor will any subsequent lease, or deed, executed by the landlord, convey any legal title as against him.

But where the grantee of the tenant, in such case, permitted the tenant to retain the possession of the premises, and the tenant, by means of such possession, obtained a credit with the defendant, and procured the lessor to convey the premises to the defendant by perpetual lease, and the defendant executed to the tenant a bond, conditioned for the conveyance of his title to the tenant on payment of a certain sum by a day named, and the tenant, failing to make payment by the day named in the bond, surrendered the possession of the premises to the defendant, who entered, and retained the possession, claiming an absolute right thereto by virtue of the lease to him from the landlord, and the orator, who was assignee of the tenants bond, and who had also purchased the title of the tenants grantee, brought his bill to assert his right within six years from the time the defendant took possession of the premises, the court held that his right was not affected by the lapse of time, but that they would not allow him to redeem, without payment to the defendant of the sum originally advanced to the tenant by the defendant upon the credit of the premises, as specified in the condition of the bond; and the court refused to compel the defendant to account for the rents and profits during the time he had been in possession, and also refused to allow him interest upon his money during that time.

And this relief was granted to the orator, notwithstanding the deed from the tenant's grantee to the orator was executed at a time when the defendant was in adverse possession of the premises, claiming title thereto by virtue of his lease.

In this case the court refused to allow costs to the defendant,—he having contested the orator's right to redeem,—and they also refused to allow costs to the orator, as he had not, before bringing his bill, actually tendered to the defendant the amount due to him.

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THIS was a bill brought to redeem certain premises by payment of the incumbrance upon them, or to set aside the proceedings by which the incumbrance was created.

The orator set forth in his bill that one Jotham Bush, on the 7th day of April, 1808, conveyed to William Nason, by perpetual lease, fifty acres of land in St. Albans, reserving an annual rent of \$6,25, the lessee paying all taxes, which lease contained a clause giving to the lessor the right of re-entry in case two years' rent should be unpaid at the same time,—the lessor giving to the tenant in arrear thirty days notice in writing before re-entering; that William Nason died in 1810, leaving a will, by which he devised to his wife, Mary Nason, an estate during her natural life, and so long as she should continue a widow, in his home farm, which comprised a portion of the said fifty acres, and to Asa Lock and his wife the residue of the said fifty acres during their natural lives, and by which all the said premises, after the termination of the said life estates, were to belong to John Nason; that the said Mary Nason took possession of that portion of the said premises devised to her, and retained possession thereof until her death, which was in 1820; that, on the 18th day of November, 1820, the estate of Asa Lock and his wife in that portion of the premises devised to them became vested in one Eleazor W. Hickok, who received the conveyance thereof as trustee of the said John Nason; and that said Hickok died in 1823, leaving his mother, Betsey Ainsworth, his heir at law.

The orator farther set forth that the said John Nason, on the 21st day of July, 1820, conveyed, by quitclaim deed, all his interest in the said fifty acres, for a valuable consideration, to his sisters, Sally Morrill, Polly Ryan, Peggy Nason and the said Betsey Ainsworth; that in 1827, there then being about \$35 of the rent of the said fifty acres in arrear and unpaid, the said Bush commenced an action of ejectment against John Nason, who was then, as tenant to Mary Nason, in possession of that portion of the said fifty acres which had been devised to said Mary; which action was entered at the April Term of Franklin county court in 1827, and was continued to the September Term of the same year; that, during the pendency of said action, John Nason, either for the purpose of defeating the title which he had conveyed to his sisters, as above mentioned, or

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son's remaining in possession paying no rent, but being under obligation to pay the amount due to the defendant, with the *interest* thereon, as a condition of the defendant's deeding to him, would undoubtedly have induced a court of equity to have granted him relief, if applied for in season. But, inasmuch as he abandoned the possession to Blaisdell, took no steps whatever to pay the amount due, and offers no excuse for not so doing, the court would not have been inclined to sustain this bill, brought after the lapse of so long a time, and relieve either Nason, or the orator, from the consequences of not complying with the condition of the bond, and paying the money when due. The orator has therefore framed his bill with a double aspect, and has set forth other grounds for equitable relief. It becomes, therefore, necessary to examine what title the defendant has to the premises in question.

By the lease from Jotham Bush to William Nason, executed in 1808, the lessor granted to the latter, his heirs and assigns, as long as water runs, grass grows, or the sun shines, the fifty acres in question, on this special condition, "that the said William Nason, his heirs and assigns, shall well and truly, yearly and every year, on the 15th day of November, pay and deliver the sum of six dollars and twenty five cents, and all taxes," &c.; "and, if any one year's rent remain unpaid for more than one year, so that two years' rent becomes due and unpaid, then it shall be lawful for the grantor, his heirs and assigns, after giving the tenant in arrear for rent *thirty days* notice in writing, to re-enter," &c. On the construction of this lease we cannot consider, as has been argued, that the estate thereby granted was limited and at an end on the failure to pay two years' rent; but there was a condition attached to the rent itself, and to the right of the landlord to re-enter,—to wit, that he should give thirty days notice to the tenant; and if he gave no such notice, he had no right to re-enter;—this principle is found in Co. Lit. 201 b. The right to re-enter for non payment of rent is not incident to the estate of the lessor at common law, but must be reserved by deed, and all the conditions, or stipulations, annexed thereto must be complied with.

It appears abundantly from the testimony in this case that Bush, previous to bringing his action of ejectment, had given no notice

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whatever to the devisees of William Nason; and the effect of his judgment against John Nason, and the executing a writ of possession, could be nothing more than a voluntary surrender, by John Nason to Bush, of his possession, which was nothing more than that of a tenant at sufferance, as he had long before deeded all his interest therein to his sisters, and as John Nason went back immediately into possession. The relative situation of John Nason and his grantees, under his deed of July 21, 1820, to Sally Morrill and others, remained unaltered. The deeds, therefore, which Israel P. Richardson received of Bush, and which the defendant received of Richardson and John Nason conveyed to him no title, as against the grantees of John Nason under the deed of 1820, and as against the devisees in the will of William Nason.

The defendant Blaisdell can set up no legal title against the grantees of John Nason under this prior deed, and, in a suit at law, their title must prevail against him. There is, therefore, an obvious equity in this case, on the part of the orator, that whatever incumbrance on the land may have been created by John Nason, and whatever embarrassments may have been caused in the title by the proceedings in the action of ejectment, and the lease to Richardson, and the deeds to Blaisdell, should be removed, and the orator be reinstated in all the rights which those, from whom he claims, had, previous to the recovery in ejectment in the name of Bush. And there is also an equity on the part of the defendant, that he should not be dispossessed, without being repaid the amount which he has advanced to John Nason. The grantees under Nason's deed of July, 1820, suffered a long time to elapse, before they set up any claim under that deed, or manifested any intention to dispute the doings of John Nason. They might and ought to have known that John Nason, under a claim, had created an embarrassment on their title, and had received credit, both of Richardson, Smith, and the defendant, on the supposition that their title was defeated by the recovery by Bush against Nason, and should have taken steps earlier to set aside that recovery, and the lease to Richardson.

But, inasmuch as Nason was suffered to remain in possession by Richardson and the defendant Blaisdell, as the owner of the estate, paying no rent therefor, and as the lease to Richardson was treated

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by him only as a security, and Nason was suffered to treat and negotiate about the land as the owner, and as Blaisdell also suffered him to remain in possession, and gave him a bond to convey, which was uncanceled and left in his possession, and as the orator commenced his action at law, in the name of one of his grantors, within three years after the defendant took possession, and commenced this bill within six years, we think the orator, is not to be precluded from his right by any lapse of time,—he consenting to make such compensation to the defendant, by repaying to him the money which he advanced on the supposition that John Nason was the owner, or otherwise, as the court may think proper, and having offered so to do in this bill. We cannot consider the defendant as a mortgagee in possession, accountable for rents and profits, but we consider him as entering by the permission of John Nason, and receiving the rents and profits in lieu of, and in satisfaction of, the accruing interest on the sum due, and specified in the condition of his bond. Nason had been in possession before, paying no rent, and Blaisdell should also remain there, paying no rent to the orator, and those under whom he claims. The orator must therefore pay to the defendant the sum due on the bond when the defendant took possession in May, 1834, and the defendant must release all title which he derived under the deeds from Richardson and Nason to him. The facts set forth in the bill, and the prayer thereof, are sufficient to entitle the orator to this relief.

It will be seen, that, in this view of the case, we have not thought proper to discuss, or decide, how far equity will relieve a tenant, when the landlord, under a clause of re-entry, has entered for a forfeiture by reason of non-payment of rent. It was said by the Lord Chancellor of Ireland, in the case of *Drought v. Redford*, 1 Molloy 572, that equity always relieved in such cases; and the cases read at the bar are very strong to that effect. The case before us does not call for a decision of that question, nor require us to say under what circumstances a court of chancery would grant, or refuse, relief to a tenant.

An objection has been raised against granting relief to the orator, on the ground that his deeds from Sally Morrill, Peggy Nason and Betsey Ainsworth are void, as the defendant was, at the time of

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their execution, in adverse possession. The court have felt there was some difficulty on this account, as there are some decisions which go the length of saying that a decree will not be made for a plaintiff, who states his title under a deed from one out of possession. The consequence, however, of dismissing the bill on this account would be to leave the defendant without any defence at law, and liable to be dispossessed without being repaid the amount he has paid out, and also liable, as a wrong doer, for the rents and profits, and compel him to come into chancery to ask the very equity which we are disposed to grant him.

We are of opinion, however, on consideration, notwithstanding this objection, that the orator may maintain this bill. The bond executed by the defendant to John Nason might be assigned, so as to transfer all the interest which he had therein. The orator, by his deeds from Sally Morrill and others, had such a claim to the land that he could maintain an action in their names to recover the possession, which, in the event of a recovery, would enure to *their* benefit. Any charge upon the land, either legal, or equitable, created by the act of John Nason, and acquiesced in by his grantees under the deed of 1820, it became the duty of this orator to pay and extinguish. The equitable right to have this incumbrance extinguished, and to receive a deed from this defendant of all his right derived from Richardson and Nason, was in this orator. As the purchase from Sally Morrill and others may be considered as made for the purpose of confirming the right of the orator, which he derived by his assignment of the bond from Nason, and as there is no proof of any champerty and maintenance, we are not disposed to consider the orator as deprived of any part of his remedy, sought for by this bill, on account of the possession of Blaisdell.

The decree of the chancellor will therefore be reversed, and the case will be remanded to the court of chancery, with directions to enter a decree that the orator, on or before the first day of May next, pay to the clerk, for the use of the defendant Blaisdell, the sum of three hundred and ninety dollars and sixty one cents, and that the defendant Blaisdell, within ten days thereafter, release to the orator all title which he derived under the deeds to him from Richardson and Nason, and give up the possession, without doing

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or permitting any waste therein, and that he pay the cost accruing in this court; and no cost will be taxed for either party previous to the decree made by the chancellor. The defendant, by resisting and contesting the right of the orator to redeem, cannot claim the benefit of that rule in equity, which awards to a mortgagee, in most cases, his costs on a bill to redeem. The orator, by not having actually tendered and offered to the defendant the amount due in equity, has not entitled himself to be paid his costs.



PEGGY NASON v. JONATHAN M. BLAISDELL.

Under a clause in a devise, which provides that the devisees may have, use and possess during their natural lives certain premises described, they paying the rents and taxes thereon, the devisees take an estate for life, which it is competent for them to assign, or convey.

A deed of land from one out of possession, which is void, under the statute of 1807, by reason of the adverse possession of a third person, will not affect the right of the grantor in such deed to maintain an action of ejectment against such third person.

EJECTMENT for fifty acres of land in St Albans. Plea, the general issue, and trial by jury.

This was the action at law alluded to in the opinion of the court in the suit in chancery, *Smith v. Blaisdell et al.*, ante, page 199, and the premises in question in the two cases were the same, and all the facts material to the right of recovery of the plaintiff in this case are sufficiently detailed in that case. The clause in the will of William Nason, by which he devised to Asa Lock and his wife the use of a portion of the premises in question, was in these words, "It 'is my will and pleasure that Asa Lock, and his wife Mary Lock, 'have, use and possess all my land on the west side of the road 'leading to Nathan Smith's during the natural lives of each, he

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‘paying the rents and taxes on said land,—being the land on which
‘he now lives, leased to me by Jotham Bush and Holloway Taylor,
‘on the west side of said road,—with the privilege of the buildings
‘thereon standing, and to revert to my beloved son, John Nason,
‘after the decease of the said Asa and his wife.’

The court charged the jury, that, if they found that the defendant was in possession of the premises, claiming the same in his own right, and adverse to the plaintiff, at the time of the execution of the deed from the plaintiff to Phelps Smith, the said deed would not defeat the plaintiff's right of recovery, as the deed would, in that case, be void under the statute of 1807; but that, if they found that the defendant was not, at that time, in such adverse possession, they should return a verdict for the defendant; that the record in the action of ejectment in favor of Bush against John Nason could not prejudice the plaintiff's right, nor aid the defendant in making out a title against the plaintiff; and that this record must be laid out of the case; that the interest of Lock and his wife in the portion of the premises devised to them by William Nason was not such an estate, or interest, as they could convey, or assign, to another; and that, if they attempted to convey their interest to another, and actually left the premises, and had neglected to pay the rents and taxes upon them, the right of said Lock and his wife, and of their grantees, was extinguished, and their right passed to the plaintiff as the grantee of the remainder man; that Bush had no right to re-enter upon said premises in 1827, until he had given to Mary Nason and Peggy Nason, who were then to be deemed his tenants, thirty days notice in writing, as stipulated in the lease to William Nason; and that, as it was not pretended that any such notice had been given, the said Bush's entry was tortious, and the plaintiff was entitled to recover the possession of the premises and the value of the rents and profits since March, 1836, the time the disseizin was alleged, as damages.

The jury returned a verdict for the plaintiff for the possession and for \$520 damages. Exceptions by defendant.

Smalley, Adams & Hoyt, for plaintiff, as to the construction and effect of the devise to Lock and his wife, cited 2 Cruise 3, §§ 1, 39; 4 Ib. 427, §§ 2-11; 2 Ib. 42, §§ 41, 45-47, 51, 53; Ib. 49, §§

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67-69; Ib. 312, §§ 29-32; 6 Ib. 448, §§ 1-5; 2 Thomas' Co. Lit. 101, note L. 2; Ib. 767, note 2; 1 Vern. 403, note 1; *Wells v. Prince*, 9 Mass. 508.

H. R. & J. J. Beardsley and *Stevens & Seymour*, for defendant, cited, to the same point, 6 Cruise 142, § 8; Ib. 144, 145, §§ 15, 16, 18; *Van Dyck v. Van Beuren*, 1 Caine 84.

The opinion of the court was delivered by

WILLIAMS, Ch. J. It will be seen, by the decree made in the suit in chancery in favor of Smith against Blaisdell, that most of the questions raised in this case have been considered. We can see no objections to any of the decisions of the county court, except their charge in answer to the request of the defendant as to the estate taken by Lock and his wife under the will of William Nason. We are to suppose that it became material to decide what estate Lock and his wife took under that will, and if it was, the defendant was entitled to the charge asked for. Under that will Lock and his wife had an estate for life, which they might assign and convey; and the court below were incorrect in saying that they had not such an estate. The words used created an estate for life in the devisees.

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ADDISON.

JANUARY TERM, 1845.

PRESENT.

HON. STEPHEN ROYCE,
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. WILLIAM HEBARD, }

WETHERELL, WHITNEY & Co. v. SAMUEL EVARTS.

An action on book account cannot be sustained, when no portion of the plaintiff's account against the defendant had become due at the time of the commencement of the action, although it was all due at the time of the hearing before the auditor.

The case of *Martin v. Fairbanks*, 7 Vt. 97, explained, and its application limited.

Book Account; the action was brought to the county court, judgment to account was rendered, and an auditor appointed.

The auditor reported that the plaintiffs' account, as presented before him, consisted of charges for merchandize, which the defendant purchased of the plaintiffs upon a year's credit; and that no

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portion of the account had become due at the time the action was commenced, but that it had all become due prior to the hearing before the auditor.

The county court rendered judgment, upon the report, in favor of the defendant; to which decision the plaintiffs excepted.

E. N. Briggs for plaintiffs.

If a suit is commenced, and there is no account, or no account which has become due, perhaps a judgment to account could be successfully resisted; but if judgment to account is rendered, the auditor must adjust the account to the time of the hearing before him. Rev. St. 220, § 9. 2 Leigh's N. P. 1556, 1557. *Newbold v. Sims*, 2 Serg. & R. 317. *Taylor v. Page*, Cro. Car. 116. In the common law action of account, and in our action of book account, there is this peculiar feature, that it is not essential to the maintenance of the action that the defendant should be indebted to the plaintiff. At common law, without our statute, the accounts are adjusted, as they exist at the time of the trial, without any reference to the standing of the accounts at the time of the commencement of the suit. *Robinson v. Bland*, 2 Burr. 1086. *Smith v. Brush*, 11 Conn. 359. The case of *Martin v. Fairbanks*, 7 Vt. 97, is full in point. And see *Ambler v. Bradley*, 6 Vt. 119.

If there is any impropriety in the rule contended for, it will be equally strong, in the case where the plaintiff is indebted to the defendant at the time the suit is brought, and the balance is turned by an account becoming due after the commencement of the action.*

C. Linsley for defendant.

1. There was no account, that could be audited, at the time of the commencement of the suit. The statute, it is true, requires that the account should be adjusted to the time of auditing; but it clearly implies the existence of a debt, or duty, on which the suit is to act. Any other construction of the statute would render the lat-

*In *Pratt v. Gallup*, 7 Vt. 344, the balance was turned by an item which accrued subsequent to the commencement of the action.

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ter part of the section, giving this power to the auditors, idle and impertinent. Rev. St. c. 36, § 9. The action of account, at common law, requires a particular relation to subsist between the parties, such as bailiff and receiver, &c., and the right to require an account at all results from these relations, and does not depend on the defendant's being a mere debtor. But the action of book account stands on totally different grounds. Willes 208.

2. If it is objected that this defence should have been pleaded in bar, it is answered, that, in this action, the defendant has all the rights before auditors, that he could have had, if he had pleaded. *Loomis v. Barrett*, 4 Vt. 450. *Bishop v. Baldwin*, 14 Vt. 145.

The opinion of the court was delivered by

BENNETT, J. It appears from the auditor's report, that, at the time when the action was commenced, the term of credit, upon which the goods were sold, had not expired; and the simple question presented for our consideration is, whether, inasmuch as the plaintiff's account became due previous to the time of the audit, this action can be sustained. If the plaintiffs had brought assumpsit, instead of the book-action, no one could have doubted, but what the defendant might have insisted, either in abatement of the action, or under the general issue, that the action had been prematurely brought.

It is claimed, however, that, in an action on book, a different rule has prevailed, and should prevail; and that it is not essential, that a right of action should have accrued at the time of the commencement of the suit, provided it has become matured at the time of the audit. Though it is a principle of the common law, that, in the action of account, all the items of the accounts of the parties, due at the time of the audit, are to be adjusted, and the same rule prevails in chancery, where a bill is brought for the settlement of accounts, yet I am not aware that it has ever been claimed, that an action of account, at the common law, could be maintained, provided no right of action had accrued, when the suit was commenced. To hold to such a doctrine would contravene first principles. There must exist a right to call upon the defendant to account, when the suit is commenced, though the particular state of the ac-

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counts may be immaterial. If one is the bailiff of the goods of another, to sell and account for at the expiration of six months, it would indeed be strange, if he could be sued at the end of sixty days. If he was to render his account upon demand, no action can be sustained, until there has been a special demand; and this must be alleged in the declaration.

The object of our book action, given by the statute, is, in the main, widely different from the action of account at common law; and it has, to a great extent, become a concurrent remedy with the action of assumpsit, for the collection of debts. If the book action can be commenced, before a right of action has accrued, it must result from the provisions of our statute, and not from any principles drawn from the common law action of account. The statute, it is true, directs the auditor to hear, examine and adjust all the accounts of the parties up to the time of making up the report; but there is no intimation, that a suit can be commenced, before any part of the account has become due. The statute, I conceive, only introduces into the book action, in this respect, the same principle which prevailed in the common law action of account; and probably the same principle would at once have been adopted, without the aid of the statute.

It is said, in argument, that the statute, in the case of *Martin v. Fairbanks*, 7 Vt. 97, has received a judicial construction, such as the plaintiffs now contend for. It appears from the report of that case that the auditor's report was excepted to, upon the ground that he had allowed *certain* charges in the plaintiff's account, which had not become payable at the commencement of the suit. As that was an appealed action, and there was no statute applicable to such a case, providing to what time the account should be adjusted, the question was raised, whether the court would, in analogy to the principles of the common law, relative to the action of account, in this respect, introduce the same principle. This is the only point discussed by the learned judge, who gives the opinion of the court. The argument of the counsel is not given; but the *exceptions* and the opinion of the court *impliedly* admit, that there was a right to sue for some portion of the items of the plaintiff's account, at the time when the action was commenced; and I have no doubt the

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trial proceeded upon that ground. I think, however, upon a careful inspection of the facts reported in that cause, there was no right of action, at the time the plaintiff's suit was commenced; and that the very question, now under consideration, might, with propriety, have been raised in that case. But, be that as it may, as the point was neither mooted by counsel, or court, we cannot regard that case as a controlling authority for this.

The statute has received a practical construction, ever since the government has been organized; and the doctrine now contended for by the plaintiff is of recent origin. This case and one commenced about the same time in the County of Chittenden are the only instances, in which I have known it to have been claimed, that a person could sue in an action on book before any thing had become due to him. The consequences of such a doctrine will be readily apprehended. The whole of a man's property may be placed under an attachment, before there has been any default in him; and the creditor, who has nothing then due and payable, may thereby gain a preference over other creditors, whose debts are due. We cannot accede to the doctrine, which must be established, to enable the plaintiffs to succeed in this suit.

The judgment of the county court is affirmed.



LEVI NEEDHAM AND ALLEN DENNIS v. JAMES HEATH.

If one obligor be sued alone upon a joint bond, and it appear from the declaration that the other obligor is still living, the declaration is bad upon demurrer; but if it do not appear from the declaration that the other obligor is still living, the non-joinder can only be taken advantage of by plea in abatement. BENNETT, J.

But in actions upon *recognizances, judgments, and other matters of record*, if it appear from the declaration that there is another joint debtor, who is not sued, the non-joinder may be taken advantage of by demurrer, although it is not shown that the other debtor is still living.

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In debt upon a recognizance for the prosecution of an appeal from the judgment of a justice of the peace, it must appear from the declaration, that the recognizance was entered into before the justice who rendered the judgment appealed from, or the declaration will be bad upon demurrer.

DEBT upon a recognizance. The plaintiffs alleged that they recovered a judgment, in their favor, against one Hiel Heath, on the 12th day of February, 1842, by the consideration of Norman Tupper, Esq., a justice of the peace, for \$42,20 damages and \$1,25 costs of suit, from which judgment the said Hiel Heath appealed; and the entering of the recognizance for the appeal was alleged in these words;—"and the said Hiel Heath, as principal, and the said 'James Heath, defendant, as surety, acknowledged themselves 'bound to the plaintiffs in a recognizance of the sum of fifty dollars, 'conditioned that the said Hiel Heath should prosecute his said appeal, so prayed out," &c. It was not alleged whether, or not, Hiel Heath was still living. The defendant demurred generally to the plaintiffs' declaration, but no question was decided upon any portion of it, except as above set forth.

The county court adjudged the declaration insufficient, and rendered judgment for the defendant; to which decision the plaintiffs excepted.

Linsley and Wicker for plaintiffs.

1. The objection, that another should have been joined as a party defendant, should have been taken by plea in abatement. For, supposing the recognizance to be joint, one may be dead, or discharged, or bankrupt. 1 Chit. Pl. 29, 37. *Hollinsworth v. Ascue*, Cro. Eliz. 355, 495. *Cabell v. Vaughan*, 1 Saund. 291.

2. A recognizance of bail is, in law, joint and several. Ham. on Part. 57. *Williams v. Green*, 8 Mod. 296. 2 Com. Dig., Tit. Bail, R. 2, note.

3. If this is not so, yet a joint and several recognizance might be taken, and, if so expressed, would be good; it shall, on demurrer, be taken that the recognizance was in this form.

E. D. Barber for defendant.

As a general rule, in actions on contract, if it appear on the face of the declaration, or other pleadings of the plaintiff, that another

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joint contractor is not made defendant, and that such person is still living, (as he will be presumed to be, unless the contrary is alleged,) the non-joinder as defendant is a good ground of demurrer. *Gould's Pl. 279. 10 Pet. 298.* But however this may be in relation to joint obligors, &c., in cases of recognizances, judgments, and other matters of record, the rule is well established, that the non-joinder of a joint debtor, when it appears on the face of a declaration, may be taken advantage of by demurrer, or arrest of judgment. *Gilman v. Rives, 10 Pet. 298. 1 Wms. Saund. 291 b c, n. (4.) Harmon et al. v. Roberts, 1 Greenl. 441. Harney v. Fales, 1 Pet. 811. Ziele v. Campbell's Ex'rs, 2 Johns. Cas. 392. Seymour v. Minturn, 17 Johns. 169. Ex'rs of Livingston v. Pierpoint et al., 11 Johns. 101. 5 Johns. 176.*

The opinion of the court was delivered by

BENNETT, J. This case comes before us upon a demurrer to the plaintiffs' declaration. The law is well settled, that, if one obligor be sued alone upon a joint bond, and it appear from the declaration that the other obligor is still living, the declaration is ill upon demurrer. It would seem, however, that, in such case, unless it appears from the declaration, or the subsequent pleadings of the plaintiff, that the other obligor is still living, the objection cannot be reached by a demurrer, a motion in arrest, or a writ of error. It is proper matter to be pleaded in abatement. See *Whelpdale's Case, 5 Coke's Rep. 119; Cabell v. Vaughan, 1 Saund. 291,* and the able note of Serjeant Williams, No. 4.

But the doctrine, which has been applied to joint obligations, does not seem fully to have been extended to cases of joint recognizances, judgments, and other matters of record. In these cases it has been held, that, if it appear from the declaration, or other pleadings of the plaintiff, that there is another joint debtor, who is not sued, the objection may be taken advantage of by a demurrer, or upon a motion in arrest of judgment, although it is not averred that he is still living. This distinction has been fully acted upon in the English Courts, and has been adopted by the Supreme Court of the United States;—and, if established by authority, it is not for us to say that there is no good sense in the distinction, which requires

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the party, when he declares upon a matter of record, to show some good reason, why he does not join others, who, from the declaration, are jointly liable. He must set forth the cause of the variance from the record. See *Blackwell v. Ashton*, Aleya 21; *Rez v. Young*, 2 Anstr. Rep. 448; 3 Anstr. Rep. 811; *Gilman v. Rives*, 10 Peter's Rep. 298.

There seems, also, to be another fatal objection to this declaration, in setting forth the recognizance. The allegation in the declaration is, that Hiel Heath, as principal, and James Heath, as surety, acknowledged themselves bound to the plaintiff in a recognizance of fifty dollars, conditioned, &c. There is no averment before whom the recognizance was entered into. *Nam constat*, but that it might have been entered into before some other magistrate, and not before the one who tried the cause; and in that event it would not be of binding force.

The result is, the declaration must be held insufficient, and the judgment of the county court is affirmed.



**WILDER & SNOW v. TRUMAN S. ELDRIDGE and DANIEL WRIGHT
AND SAMUEL S. WRIGHT, Trustees.**

Under the statute of this State, relative to trustee process, a minor may be charged as trustee for any indebtedness to the principal debtor for *necessaries*, or for any specific goods and chattels of the principal debtor in his hands. BENNETT, J.

But it is as necessary that a minor should defend by guardian in a trustee process, as in any other case, and his guardian, if he have one, must be cited in; and if this is not done, the plaintiff must, at his peril, apply to the court to appoint a guardian *ad litem*.

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But if the trustee, though a minor at the time of the service of the trustee process, become of age before disclosure is made, it is not *then* necessary to appoint a guardian *ad litem*.

But where a minor, previous to the service of the trustee process upon him, had purchased of the principal debtor a horse, and given his note therefor, but under an agreement, that, if the horse proved unsound, he might return the horse and receive back the note, and, after the service of the trustee process, and before he became of age, he did rescind the contract and deliver the horse to the principal debtor, and after he became of age he made his disclosure, setting forth these facts, and no guardian had ever appeared for him, or been appointed by the court, it was held that he could not be held chargeable as trustee.

Where exceptions are taken to the decision of the county court in discharging a trustee, and the supreme court affirm that judgment, they will also, *pro forma*, affirm the judgment against the principal debtor without costs.

TRUSTEE PROCESS. The action was referred, and the referee reported that Daniel Wright was not trustee. In reference to Samuel S. Wright he reported, in substance, as follows.

Previous to the service of this process Samuel S. Wright had purchased of the principal debtor, Eldridge, a horse, at seventy five dollars, for which he gave his note, but under an agreement between them, by parol, that, if the horse did not answer the recommendations, he might return him to Eldridge, rescind the contract, and receive back his note. At the time of the service of the trustee process the horse was in Wright's possession, under this contract, and the referee found that he was of the value of fifty dollars. After the service of the trustee process, the horse proving to be unsound, Wright returned him to Eldridge and received back his note; and it appeared that the father in law of Eldridge immediately attached the horse as the property of Eldridge, and had him sold upon execution, and he was bid off by a brother in law of Eldridge and went immediately back into the possession of Eldridge, who had ever since retained him. Wright was under the age of twenty one years at the time of all these transactions, but carried on business on his own account, by the permission of his father. After Wright became of age he filed his disclosure in this case, from which, and other

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evidence, the referees ascertained the facts above set forth. It did not appear that Wright had appeared by guardian, or that a guardian *ad litem* had ever been appointed.

The county court adjudged that neither of the trustees were chargeable, to which decision, as to Samuel S Wright, the plaintiffs excepted.

Woodbridge and J. Pierpoint for plaintiffs.

The fourth section of the statute relative to trustee process,—Rev. St. 190,—comprehends all persons who are legally capable of having the possession of property; and a minor is as competent to hold the possession of property as an adult. If a minor has the property of another in his possession, which he refuses to deliver up, he is liable to the owner, the same as an adult. *Reeve's Dom. Rel. 243*. An infant may be a trustee at common law, also an executor, or jailor; and in all these capacities he is liable, the same as an adult. *Bac. Abr. 585. Reeve's Dom. Rel. 236. Ex'rs of Loop v. Adm'rs of Loop, 1 Vt. 177.*

If Wright had availed himself of his infancy to avoid the note, this would have vested the property in the horse in Eldridge, and made Wright his trustee. *Reeve's Dom. Rel. 244. 15 Mass. 359. 13 Mass. 205.* Can it make any difference in his liability, whether he avails himself of a positive rule of law in his favor to avoid the note, or of a provision in the terms of his contract for the same purpose? We think not.

E. D. Barber for trustee.

1. Wright could in no way have been made liable for the horse, except in trover, upon a rescinding of the contract, and after a demand and refusal. But the trustee process will not reach such a liability. *Hayt v. Ball & Tr., 13 Vt. 129. Watson v. Todd & Tr., 5 Mass. 271. Cushing's Tr. Proc. 36, 37. Wentworth v. Whittemore & Tr., 1 Mass. 471. Fitch v. Waite, 5 Conn. 117.*

2. At the time of the service of the trustee process upon Wright, there was nothing due from him absolutely, and without depending on any contingency. *Rev. St. c. 29, § 29.* The note was not due absolutely, because it was subject to his right to rescind; the

horse did not belong to Eldridge, because the contract had not been rescinded.

3. But even if, had he been of full age, he would have been bound to have kept the horse in his possession, after rescinding the contract, subject to the trustee process, he cannot, by reason of infancy, be made liable as trustee for neglecting to do so. Bac. Abr., Infant G.

4. An infant can in no case be held as trustee, under the statute. By the common law, if an infant be sued, he must appear and defend by guardian, and his guardian, if he have one, must be notified; if not, a guardian *ad litem* must be appointed. Com. Dig., Pleader, 202. Bac. Abr., Infant, K. 2. In this proceeding the trustee is not strictly a party, and no rule of the common law could make it necessary to notify his guardian, or to have a guardian *ad litem* appointed.

The opinion of the court was delivered by

BENNETT, J. The only question in this case arises upon the disclosure of Samuel S. Wright. It is argued, that, upon general principles, a minor can in no case be charged as trustee by means of the trustee process. It would seem, if there is an attempt to charge him upon the ground of having in his hands the *credits* of the principal debtor, that the plea of infancy should avail the trustee, equally as if sued directly by the principal debtor; but if the minor is liable to the principal debtor for *necessaries*, no good reason is perceived why he may not be charged as his trustee, to the extent of such liability, by means of the trustee process.

So, if he has the *specific goods and chattels* of the principal debtor in his hands, we see no sufficient reason, why they should not be reached by the trustee process. The statute provides that *every person*, who has the goods, effects and credits of the principal debtor intrusted to, or deposited in, his hands, may be summoned as trustee, and the goods, effects and credits be attached, and held to respond the judgment, that shall be recovered against the principal debtor. The general words of the statute include minors, though it is true the court might, upon sufficient reasons, re-

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strain these general words, by holding that minors did not come within the equity of the statute.

But we do not apprehend that there is any good reason for restraining these general words. The attaching creditor takes the place of the owner of the property attached in the hands of the trustee. No new liability is imposed upon the trustee, and he has only to deliver the property to the officer, who shall have the execution, instead of delivering it to the principal debtor. If he refuses, he is liable to the attaching creditor, to the value of the goods. The minor would be liable, to the extent of the value of the goods, to the owner of them, provided there had been no attachment. In such case the minor stands in the nature of a trustee, and holds the goods as such, and should, upon common principles, be held liable.

But a minor, when sued, is not capable of conducting the suit; and it is as necessary that he should defend by guardian in a trustee process, so long as he is a minor, as in other cases. To give the trustee process the effect of an attachment of the goods, against the minor, from the date of the service, his guardian, if he had one, should have been cited in. If this is not done, the plaintiff must, at his peril, apply to the court to have a guardian *ad litem* appointed. But in the present case, as the trustee became of age before the disclosure was made, there was, at that time, no occasion for the appointment of a guardian. The property, however, had, before this, and while the trustee was a minor, been given up to the principal debtor, in pursuance of the original contract.

Had the trustee, in this case, been of age, and had elected, after the service of the trustee process, to rescind the contract and demand his note, it would seem as if he would thereby be excused from delivering the property to the principal debtor, but should, from that time, treat it as in the custody of the law. But as, in this case, the property was given up by the trustee, while under age, though after the service of the process, and while he was incapable of conducting his defence, and, in contemplation of law, not understanding his rights, or liabilities, we cannot consider the attachment, at that time, of such binding force against him as to render him liable at all events as trustee in this action.

Adm'r of Hammond v. Smith.

The judgment of the county court, discharging this trustee, is affirmed with costs.

The judgment against the principal debtor is, *pro forma*, affirmed without costs.



ADMINISTRATOR OF THOMAS D. HAMMOND v. ALLEN SMITH.

To avoid a note for usury, it must be proved that an usurious agreement was made between the parties at the time when the money, for which the note was executed, was loaned.

Proof of payment of usurious interest upon the note affords only presumptive evidence that a previous usurious agreement had been made; and the court, even if they presume that an usurious agreement was made, will not proceed farther, and, from that fact, presume that that agreement was made when the money was loaned; and that testimony alone, unaccompanied by other circumstances, will not be submitted to the jury to weigh.

A presumption cannot be based upon a presumption.

EXECUTION upon mortgage. It was conceded that the defendant was in possession of the mortgaged premises, and that he executed the notes described in the condition attached to the mortgage deed.

The defendant relied upon proving that the notes were void for usury; and, to prove this, introduced one Sunderland as a witness, who testified, that, in March, 1834, he was present and heard a conversation between the defendant and the plaintiff's intestate, Hammond, in which the defendant said, "I cannot afford to pay so much interest as I have been paying; twelve *per cent.* is more than I can afford." Hammond said the money was worth twelve *per cent.* to him, and if the defendant did not wish to pay it, he might return the money. The defendant at the same time paid to Hammond some money, the amount of which the witness could not state. In the course of the conversation the defendant urged Hammond to take a less rate of interest than the defendant had been paying,—to which Hammond declined agreeing. The mortgage, by which

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counts may be immaterial. If one is the bailiff of the goods of another, to sell and account for at the expiration of six months, it would indeed be strange, if he could be sued at the end of sixty days. If he was to render his account upon demand, no action can be sustained, until there has been a special demand; and this must be alleged in the declaration.

The object of our book action, given by the statute, is, in the main, widely different from the action of account at common law; and it has, to a great extent, become a concurrent remedy with the action of assumpsit, for the collection of debts. If the book action can be commenced, before a right of action has accrued, it must result from the provisions of our statute, and not from any principles drawn from the common law action of account. The statute, it is true, directs the auditor to hear, examine and adjust all the accounts of the parties up to the time of making up the report; but there is no intimation, that a suit can be commenced, before any part of the account has become due. The statute, I conceive, only introduces into the book action, in this respect, the same principle which prevailed in the common law action of account; and probably the same principle would at once have been adopted, without the aid of the statute.

It is said, in argument, that the statute, in the case of *Martin v. Fairbanks*, 7 Vt. 97, has received a judicial construction, such as the plaintiffs now contend for. It appears from the report of that case that the auditor's report was excepted to, upon the ground that he had allowed *certain* charges in the plaintiff's account, which had not become payable at the commencement of the suit. As that was an appealed action, and there was no statute applicable to such a case, providing to what time the account should be adjusted, the question was raised, whether the court would, in analogy to the principles of the common law, relative to the action of account, in this respect, introduce the same principle. This is the only point discussed by the learned judge, who gives the opinion of the court. The argument of the counsel is not given; but the *exceptions* and the opinion of the court *impliedly* admit, that there was a right to sue for some portion of the items of the plaintiff's account, at the time when the action was commenced; and I have no doubt the

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trial proceeded upon that ground. I think, however, upon a careful inspection of the facts reported in that cause, there was no right of action, at the time the plaintiff's suit was commenced; and that the very question, now under consideration, might, with propriety, have been raised in that case. But, be that as it may, as the point was neither mooted by counsel, or court, we cannot regard that case as a controlling authority for this.

The statute has received a practical construction, ever since the government has been organized; and the doctrine now contended for by the plaintiff is of recent origin. This case and one commenced about the same time in the County of Chittenden are the only instances, in which I have known it to have been claimed, that a person could sue in an action on book before any thing had become due to him. The consequences of such a doctrine will be readily apprehended. The whole of a man's property may be placed under an attachment, before there has been any default in him; and the creditor, who has nothing then due and payable, may thereby gain a preference over other creditors, whose debts are due. We cannot accede to the doctrine, which must be established, to enable the plaintiffs to succeed in this suit.

The judgment of the county court is affirmed.



LEVI NEEDHAM AND ALLEN DENNIS v. JAMES HEATH.

If one obligor be sued alone upon a joint bond, and it appear from the declaration that the other obligor is still living, the declaration is bad upon demurrer; but if it do not appear from the declaration that the other obligor is still living, the non-joinder can only be taken advantage of by plea in abatement. BENNETT, J.

But in actions upon *recognizances, judgments, and other matters of record*, if it appear from the declaration that there is another joint debtor, who is not sued, the non-joinder may be taken advantage of by demurrer, although it is not shown that the other debtor is still living.

Adm'r of Hammond v. Smith.

Chitty, in his treatise upon contracts, p. 541, that mere proof that *usurious* interest had been paid upon a note reserving legal interest will not establish the fact of an original agreement for usury. Though it appears in the case cited by Mr. Chitty, *Fussil v. Brooks*, 12 E. C. L. 145, that such evidence was given to the jury, yet it was a case at *nisi prius*, and no question was raised as to its competency.

We think, then, that, as any usurious agreement was only established as matter of presumption from the testimony, and that, if an usurious agreement is presumed, still that it can have no relation to the notes in question, or to the time when the original loan was made, except by presumption, the court below was justified in directing a verdict for the plaintiff.

The judgment of the county court is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF RUTLAND.

JANUARY TERM, 1845.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE,
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. WILLIAM HEBARD, }

MILLER & DUSTIN v. JEREMIAH DOW

Where one of two partners was individually indebted, and his creditor charged the debt to the firm, and informed both partners that he had done so, and subsequently the indebted partner delivered to the creditor property of the firm in payment of the debt, and this was known to the other partner, who also knew that the creditor supposed that he was receiving the property in payment for the debt, it was held, in an action on book account, brought by the firm against the creditor, and in which they claimed to recover for the property so delivered, that the creditor was entitled to be allowed for the charge thus made by him against the firm.

BOOK ACCOUNT. The only question which arose in the case was in reference to one item of \$45.70 in the defendant's account, in reference to which the auditor reported as follows.

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In July, 1841, J. & A. H. Miller, then partners in business, entered into an agreement with the defendant, by which they were to pay him, of the wages of one Otwin Milly, who was then in their employment, five dollars per month in work out of their shop. Within a short time after the making of this agreement the firm of J. & A. H. Miller was dissolved, and the said A. H. Miller, who was one of the present plaintiffs, continued to carry on the business previously carried on by the firm, and the said Otwin Milly remained in his employment. In March, 1842, the partnership between the present plaintiffs was formed, and in July, 1842, the defendant made the said charge of \$45.70 against them, which was in these words,—“Balance of Otwin Milly’s bill, rent to April 1st, 1842, \$45.70,”—and in July, or August, of the same year both of the plaintiffs had knowledge that the defendant had made this charge against them, and that he expected them to pay it in work from their shop. Subsequently, and at a time, when, as the accounts stood, exclusive of that charge, there was a balance due to the plaintiffs, the plaintiff Miller solicited the defendant to take cabinet ware out of their shop, for what they were owing him; and the defendant did, subsequently, take articles from the plaintiff’s shop to an amount exceeding said charge, supposing that he was receiving them in payment of that charge. It did not appear that either of the plaintiffs expressly assented to the payment of the charge, or that they ever expressed to the defendant any objection to allowing it, until after the defendant had taken the articles, as above mentioned. It appeared that the plaintiff Miller had retained, out of Milly’s wages, \$43.00, of which Dustin had no knowledge.

The county court, upon these facts, allowed to the defendant the said charge, in offset to the plaintiff’s account; to which decision the plaintiffs excepted.

Thrall & Pond for plaintiffs.

R. Pierpoint for defendant.

The opinion of the court was delivered by

BENNETT, J. The only question, arising in relation to the report of the auditor, respects a single item of \$45.70 in the account

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of the defendant. In relation to this it is found, that, in July, 1841, the plaintiff Miller was one of the firm of J. & A. H. Miller, and that one Otwin Milly was in their service, and that the firm agreed with the defendant to pay him, of the wages of Otwin Milly, five dollars per month; that soon after this the Millers dissolved, and the business was carried on by A. H. Miller, one of the present plaintiffs, and Otwin Milly continued in his service; and that in March, 1842, the present plaintiffs went into partnership in the same business. In July, 1842, the defendant charged the amount due him of Otwin's wages to the present plaintiffs; and during that month, or in August, both of the plaintiffs had notice that the charge was made to them, and that the defendant expected they would pay it to him out of their shop; and it appears that Miller subsequently solicited the defendant to take cabinet work out of their shop for what they owed him, and that the defendant did subsequently take up more than sufficient to balance this charge, upon the supposition, on his part, that he was taking it in liquidation of the charge.

Upon such a state of facts there can be no doubt but what the auditor was correct, in giving the defendant the benefit of the charge. No objection was made by either of the plaintiffs, when they had notice that the charge was made to them and that payment was expected from them. The defendant was requested by Miller to take up what the plaintiffs owed him, and the defendant took up more than sufficient to balance this item in the account, supposing the charge was thereby to be cancelled. It is competent for one partner, even, without the knowledge of the other partner, to deliver the partnership goods in payment of his private debt; but in this case, as the charge was made to the firm with the knowledge of Dustin, and no dissent was expressed, it is to be taken that he assented to the delivery of the articles on the particular account, upon which the defendant supposed that he was receiving them.

The judgment of the county court is affirmed.

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LORENZO SHELTON v. PATRICK FLYNN.

Where items were charged in an account, which were not legitimate and proper subjects of a charge on book, and were stricken out before the commencement of the action upon the account,—which was brought before a justice of the peace,—it was held that the jurisdiction of the justice was not thereby affected.

And if the defendant's account contain charges which accrued in payment of the items thus stricken from the plaintiff's account, it will be proper for the auditor to deduct such items from the amount of the defendant's charges of that character, and apply the balance, together with the remainder of the defendant's account, in offset to the plaintiff's account;—and the appellate jurisdiction of the county court will not be affected by the plaintiff's claiming that such deduction should be made.

BOOK ACCOUNT. The action was brought originally before a justice of the peace, and came to the county court by appeal; in that court judgment to account was rendered, and an auditor was appointed.

The auditor reported that the plaintiff's account, as presented before him, amounted to \$81,44, of which he allowed \$74,35; and that the defendant's account, as allowed, amounted to \$125,35,—of which more than \$100 was for labor performed by the defendant for the plaintiff; that it appeared that the plaintiff owned a note, signed by the defendant and one Mumford, given to one Abram Mead, and payable in work, and had also claims against the defendant for rent of a tenement and cooking stove from April 1, 1840, to April 1, 1843, which had never been paid, except by the labor charged in the defendant's account; and that it had been understood and agreed by the parties that the labor of the defendant should apply in payment of the note and rent, although no particular portion of the labor performed by the defendant had ever been designated, as being to be applied upon the rent, or the note.

The auditor also reported, that it appeared from the plaintiff's original book, that, in 1841, he charged upon his book \$9,00 of the rent which then accrued, and that after the close of the account the parties attempted to settle, and the plaintiff then entered on his book two other charges for rent, amounting to \$46,00; that the

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parties did not settle, and the plaintiff, before the commencement of this action, erased from his account the three charges for rent.

The auditor deducted from the amount of the defendant's charges for labor the amount due upon the Mead note, also the amount due to the plaintiff for rent, and reported that he found a balance due from the defendant to the plaintiff of \$13,62.

The defendant excepted to the report, for the reason that the auditor had deducted from his account the amount of the note and rent, and also because he alleged that it appeared that the justice, before whom the action was originally brought, had no jurisdiction thereof.

The county court overruled the exceptions, and rendered judgment for the plaintiff upon the report; to which decision the defendant excepted.

Thrall & Pond for defendant.

1. The defendant contends that the two items deducted from his account, consisting of the Mead note and the charge for rent, were, at the time this suit was commenced, existing claims in favor of the plaintiff, in no way *cancelled* or *paid* by the defendant's account.

The rule of law, applicable to cases of this kind, is this,—that, where there are mutual dealings between parties, and where services are rendered, or articles delivered, by one party to be *applied in payment* of a pre-existing, or an accruing, account, yet, so long as no *specific application* of the *payment* is made, both claims continue to exist, to be enforced according as the law directs and requires. *Wood v. Barney*, 2 Vt. 374. *Stevens v. Tuttle*, 3 Ib. 519. In order to be considered a payment, "it must appear that it 'was *delivered and received in payment*, and that nothing more was to be done *between the parties* to complete the application." *Strong v. McConnell*, 10 Vt. 231. If it was the design of the parties that there should be a *future adjustment*, this would prevent its operating as payment. *Strong v. McConnell*, 5 Vt. 338. *Chellis v. Wood*, 11 Vt. 468.

The auditor finds, in this case, that the work of the defendant was

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to be applied towards the payment of the rent and note, but no application was made. Therefore the account of the defendant and the claim of the plaintiff for rent and on the note continued to exist, subject to a future adjustment.

2. This principle of law being established, we are next to enquire as to its effect upon this case. We contend, that, though the plaintiff, after he had entered the items for rent in his account, with a view to a settlement and adjustment according to the understanding of the parties, afterwards erased those items from his account, and presented at first only the remaining items of his account to the auditor, yet, if he afterwards insisted upon the allowance of the claim in this action at all, it became a part of his account, as understandingly made up by him. A party is allowed to charge rent on book and recover therefor, "when, by the course of dealings between the parties, it is shown that it was intended to be a matter of account between them and to be entered and adjusted on 'book.'" *Per* PRENTISS, CH. J., in *Case v. Berry*, 3 Vt. 332. *Gunnison v. Bancroft*, 11 Vt. 490.

These cases do not proceed upon the ground that the articles delivered, or services rendered, have operated as payment, but precisely the contrary. Not having so operated, and the claim of the other party not being extinguished, or cancelled, they allow the party to make a charge of rent to offset the claim for services."

3. The jurisdiction of the county court would attach in this case, even if we should regard the items of rent as paid by the defendant's account. The amount of the rent had to be ascertained by the auditor from the examination of the parties, and therefore the items for rent became a claim on the part of the plaintiff. This would make the debit side of the plaintiff's account over \$100.

What has been said in relation to the rent applies equally to the note. *Fassett v. Vincent*, 8 Vt. 73. *Barlow v. Butler*, 1 Vt. 146.

Foot & Everts for plaintiff.

1. The note payable to Mead in work was correctly set off against the account for work; it was agreed by the parties that it

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should be so set off. Also the amount due for rent was a good offset to the account for work. Rev. Stat. c. 34, § 3. The services rendered by the defendant were in *payment* of the rent and note. 13 Vt. 15.

2. The plaintiff's account was within the jurisdiction of the justice, the amount charged upon the plaintiff's book being \$81.44. The rent could not be charged upon the plaintiff's book, and thereby affect the jurisdiction. The jurisdiction of the court cannot be affected by the entry of items not proper subjects of book charge. 14 Vt. 254. 9 Ib. 339, 399.

The opinion of the court was delivered by

WILLIAMS, Ch. J. The plaintiff's account, as allowed and adjusted by the auditor, was within the jurisdiction of a justice of the peace. His account, as presented to the auditor, amounted to no more than \$81.44. The two claims for rent and for the note in favor of Mead were not legitimate and proper subjects of a charge on book; and if they had been so charged, they could not have altered the jurisdiction, nor have justified the plaintiff in bringing the action before the county court, if he had been disposed so to do. The case of *Scott et al. v. Sampson et al.*, 9 Vt. 339, and that of *Phelps et al. v. Wood*, 9 Vt. 399, decide that jurisdiction is not taken from a justice, in the action on book, by the entry of charges which the creditor is not authorized to make, or which were made and posted by mistake.

The only object, in exhibiting these two claims for rent and for the note, was to obviate a part of the claim of the defendant, and to use them as evidence, to prove that that part of the defendant's exhibit for work, which he presented, was not a legitimate claim against the plaintiff, but that the labor charged had been performed in payment for the rent and note. It did not affect the question of jurisdiction, nor would the plaintiff have been justified in bringing his action originally to the county court in consequence of those claims.

The judgment of the county court, in sustaining the appellate jurisdiction, is affirmed.

Hodges et al. v. Parker et al.

**H. & S. W. HODGES, HORATIO WALKER AND GEORGE T. HODGES
v. RUEL PARKER AND SAMUEL P. CURTISS.**

The individual members of a copartnership, who have advanced money for the benefit of the firm, are, in an action of account brought to liquidate the concerns of the firm, entitled to interest on such advances from the time they were made.

The supreme court, upon a hearing upon an auditor's report, will not examine as to whether the auditor has drawn wrong conclusions as to the facts from the testimony before him, or whether he has made mistakes in the computation of interest, or whether he has neglected to report any facts which he was requested to report; these matters must be inquired into before the county court.

ACCOUNT. The parties to this action had formerly been partners in the business of purchasing and selling wool, &c., under the name of the "Wool Co.," and this action was brought to liquidate and adjust the partnership accounts. Judgment to account was rendered in the county court, and auditors were appointed.

The auditors reported transcripts of the accounts of the parties, and that the transactions stated therein comprised all the business which was done on the joint account of the plaintiffs and defendants; and they found a balance due from the defendants to the plaintiffs of \$62.39.

The defendants filed exceptions to the report, assigning as causes,—1, That the auditors had not returned the accounts of the parties, with their reasons for allowing, or disallowing, certain items therein; 2, That the auditors had charged the defendants with interest on moneys, received by them to expend upon the joint account, from the date of the receipt of the money to the time of the audit; 3, That the auditors had charged the defendants with \$1000 as received by them Aug. 19, 1830, when the receipt exhibited by the plaintiffs as a voucher for that charge bore date Aug. 29, 1830, and had an indorsement upon it of \$7.50, which was not noticed by the auditors; 4, That the auditors had omitted to give the defendants credit for an item of \$32.31, credited by the plaintiffs to the defendants for their portion of the profits of the concern in 1830,

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and respecting which there was no dispute between the parties, without giving any reason for such omission.

The county court overruled the exceptions, and rendered judgment upon the report in favor of the plaintiffs; to which decision the defendants excepted.

Thrall & Pond for defendants.

S. H. & E. F. Hodges and *Ormsbee & Edgerton* for plaintiffs.

The opinion of the court was delivered by

WILLIAMS, CH. J. There are no errors appearing upon the face of the report, which require us to reverse the judgment of the county court in accepting it. If the auditors drew wrong conclusions from the testimony, or if they mistook in casting interest, it should have been rectified in the county court. But, inasmuch as we cannot resort to the evidence which was had before the auditors, it cannot be here determined whether any wrong conclusion has been made, or whether any mistakes occurred.

The first exception, to wit, that the accounts have not been returned, is not sustained by the papers before us, inasmuch as it appears that the accounts were returned, as adjusted by the auditors.

In relation to the allowance of the interest, this, so far as it depended upon the testimony, was a subject exclusively for the consideration of the auditors; and from their report we consider that they allowed and cast the interest correctly. The plaintiffs were entitled to interest on the money advanced, from the time it was advanced.

The other exceptions, which have been urged, present no question of law. If the auditors did not decide correctly on the testimony, or if they omitted to report any facts which they were required to report, this should have been made to appear to the county court, who were competent to correct the error, either by re-committing, or rejecting, the report, as the evidence before them might have required. But we discover no error, either in the auditors, or in the county court, which calls for a reversal of their judgment.

The judgment is affirmed.

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CALEB B. HALL v. HIRAM HUNTOON.

An agent, who makes a promise, and who does not conceal his agency, nor exceed his authority, is not liable to an action upon such promise.

A declaration, counting upon a sale made by the plaintiff to the defendant, and a promise thereupon made by the defendant to the plaintiff, is not sustained by proof of a sale made by a third person, and a promise by the defendant to such third person, for the benefit of the plaintiff. Where a promise is made to a third person for the benefit of the plaintiff, the declaration must state it to have been made according to the fact.

A contract entered into to indemnify a sheriff for a *past* neglect is not void for illegality.

The legal interest in a contract is in the person to whom the promise is made, and from whom the consideration passes, and he is the person who must bring the action upon such contract,—as held in *Pangborn v. Saxton*, 11 Vt. 79, and *Crampton v. Ballard*, 10 Vt. 251.

The case of *Dutton et ux. v. Pool*, 2 Lev. 210, 1 Ventr. 318, T. Raym. 302, commented upon and explained.

ASSUMPSIT upon an alleged contract of indemnity. Plea, the general issue, and trial by jury.

The plaintiff's declaration was, in substance, that the plaintiff, on the 6th day of November, 1841, as constable of the town of Clarendon, had an execution to collect in favor of one Eliza A. Marsh against the first school district in the town of Shrewsbury, and on the same day levied said execution upon a horse, the property of one Levi Finney, an inhabitant of said district, and sold said horse to satisfy the same; that the defendant afterwards, to wit, on the 15th day of November, 1841, "in consideration that the said Caleb [the plaintiff] would sell to him the said Hiram [defendant], 'the horse aforesaid for the sum of fifteen dollars, undertook, 'and to the said Caleb promised faithfully, to indemnify and save 'harmless the said Caleb from all damages and costs, payments and 'expenses which he, the said Caleb, should, or might, incur, bear, 'or sustain, by reason of his having so levied said execution upon 'the said horse of the said Levi Finney, and sold the same;" and

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the plaintiff averred that he, confiding in said promise, sold said horse to the defendant for said sum of \$15, and that afterwards the said Finney commenced an action against the plaintiff for having levied said execution upon said horse and sold the same, and recovered judgment against the plaintiff for damages and costs, of which the defendant had notice; and that the defendant had not indemnified the plaintiff, according to his promise. The declaration contained a second count, in substance the same with the one above specified, and also a count for money paid, laid out and expended.

On trial the plaintiff, in support of the issue on his part, offered to prove, that, in the fall of 1841, he held, as constable, an execution in favor of Eliza A. Marsh against the first school district in the town of Shrewsbury; that he made a demand of the amount due thereon of the clerk of said district, but made no demand of the prudential committee, and, six days thereafter, levied said execution upon a horse belonging to one Levi Finney, an inhabitant of said district; and that, at the plaintiff's request, there being no other bidders, one Jeffrey A. Barney, the uncle of the plaintiff, bid off said horse for ten dollars, and paid for the same to the plaintiff; that, soon after, said Hall learned that his proceedings had been informal, and informed said Barney thereof; that said Finney soon after procured the defendant to go to said Barney and purchase said horse back again, and furnished him with money for that purpose; that the defendant thereupon applied to the said Barney, and purchased the horse back for fifteen dollars, and paid him therefor, and returned the horse to said Finney; that on that occasion, and as a part of the contract of purchase, the defendant undertook and promised, in consideration that said Barney would sell him the horse for fifteen dollars, to indemnify the plaintiff and save him harmless from all cost and damage arising from his so selling said horse, as stated in the declaration; that said Barney made this contract for the benefit of the plaintiff, and from motives of affection for him; that the said Finney afterwards sued the plaintiff for so selling said horse, and recovered, as described in the declaration, on account of the irregularity of the plaintiff's proceedings in collecting said execution; and that, on the trial of the said last mentioned suit, the

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said Huntoon was examined as a witness, and wholly denied that he was said Finney's agent in purchasing said horse.

The court decided that the plaintiff would not be entitled to recover on showing these facts; to which decision the plaintiff excepted. A verdict passed for the defendant.

S. H. & E. F. Hodges for plaintiff.

L. The first question in the case is, whether the action was properly brought, or whether Barney should have been plaintiff,—Barney having furnished the consideration, but the plaintiff, only, being interested in the performance of the contract. The plaintiff's counsel take this to be the principle that governs this class of cases. Where the party advancing the consideration of such a contract, (resting in parol) may be presumed to have parted with his interest in it, and to have transferred it, either by donation, or sale, to the person for whose benefit the contract enures, then the latter must bring the action; and the former will be considered as having acted as his agent, in advancing the consideration and taking the promise. The case, then, becomes perfectly parallel to that of contracts made by an agent for his principal, in which it is well settled the principal must sue. *Pigett v. Thompson*, 3 B. & P. 147.

The principle is fully sustained by the well settled doctrine, that money paid by one for the benefit of a third person may be recovered by the latter. *Ward v. Evans*, 2 Ld. Raym. 928. *Beckingham v. Vaughan*, 1 Rolle 7. *Harris v. DeBervoir*, Cro. Jac. 687. (*Greenville v. Stancy*, 36 H. 6, pl. 10, and 39 H. 6, pl. 44,—there cited.) *Weston v. Barker*, 12 Johns. 276. *McMennomy v. Ferris*, 3 Johns. 72.

This class of decisions is sometimes, indeed, treated as if they were exceptions to the general rule. But it is not so. They are in strict accordance with sound principle and authority. This will appear from numerous cases which do not come within this class, and yet sustain our general position. *Disborne v. Denaba*, 1 Rolle 30;—*S. C.*, 1 Vin. Ab. 333. *Starkey v. Mylne*, 1 Rolle 32;—*S. C.*, 1 Vin. Ab. 335. *Rizon v. Horton*, 1 Vin. Ab. 334 in margin. *Marchington v. Vernon*, 1 B. & P. 101, note b. *Shaw v. Sherwood*, Cro. Eliz. 729. *Horwood v. Shaw*, Yelv. 23. 10 Wend. 88.

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Furley v. Cleveland, 4 Cow. 432. *Arnold v. Lyman*, 17 Mass. 400. *Cabot v. Haskins*, 3 Pick. 83. *Spear v. Mallory*, 13 Johns. 496. Here the persons advancing the consideration had transferred their interest in it by way of sale. Many other cases, where they had parted with it from motives of affection for the person to be benefited, are identical in principle with the present action. It will be seen that they are not confined to the relation of parent and child, as has been sometimes suggested. *Dutton v. Poole*, cited 3 B. & P. 149, note, and in 1 Vin. Abr. 337. Cowp. 443. *Oldham v. Bateman*, 1 Rolle 31;—*S. C.*, 1 Vin. Ab. 334. *Sadler v. Paine*, Sav. 23, (cited com. Dig. 304 &c.) *Lenn v. Hays*, Moor. 550, (cited 8 Mod. 117.) *Levet v. Hawes*, Cro. Eliz. 619. Ib. 652. *Anon.*, 1 Vent. 6, (cited 2 Com. on Cont. 565.) *Schermerhorn v. Vanderheyden*, 1 Johns. 139. *Sailly v. Cleaveland*, 10 Wend. 158. *Shephard v. Shephard*, 7 Johns. Ch. R. 57. *Felton v. Dickinson*, 10 Mass. 287. *Jackson v. Mayo*, 11 Mass. 147. *Crocker v. Higgins*, 7 Conn. 342. *Gwallaker v. Gwallaker*, 5 Watts 200. 1 Ch. on Pl. (Ed. 1844) p. 4, note 1, and cases cited.

We admit that sometimes it has been decided that the person furnishing the consideration must sue. For aught that appears, it might be because he had never parted with his interest in it. Our argument admits and supposes such instances may occur. Before our position can be shaken in this way however, we must see from the case produced that the person advancing the consideration had parted with the control of it, and yet the person to be benefited was not allowed to maintain the action. Such cases can rarely be found, and none in which *Dutton v. Poole* has been necessarily overruled. *Norris v. Pine*,—cited 1 Vin. Abr. 337.

The ground, upon which that position has been most strongly assailed, is its apparent inconsistency with the principle, that the payment of the consideration points out the person in whose name the action must be brought. We contend that this principle is to be confined to those cases where several parties may derive a benefit from the performance of the contract; such was *Crampton v. Ballard*, 10 Vt. 251. It has nothing to do with those cases where but one person is interested in its performance.

Cases analogous to these in principle have also been cited

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against us, in which it has been held, that, where the defendant has promised to pay a debt, which the person advancing the consideration owed another, the latter, the creditor, could not sue, but the debtor, the person advancing the consideration. In these it is obvious that the debtor has an interest in the performance of the contract, as well as the creditor; and as he bought the contract, he alone is to have the benefit of it, and must sue on it. To this class belong *Crow v. Rogers*, Str. 592. A like case, still more remote in principle, however, is sometimes found, where the consideration consists in the indebtedness of the defendant to the debtor, and that indebtedness is not discharged. Then the creditor can of course maintain no action. Not only is another equally interested in the contract, but there is in fact no consideration for it;—such was *Phalan v. Stiles*, 11 Vt. 82. Even there it was admitted, that, had the original indebtedness of the defendant to the plaintiff's debtor been discharged, the promise made to the latter to pay his debt to the plaintiff would have sustained the action. Our main principle could not have been more strongly recognized.

II. It was farther objected, that the contract was without consideration, Barney having no property in the horse on account of the illegality of the sale to him. In reply we say, that, the property being in Barney's possession, the sale was accompanied with an implied warranty, which was a sufficient consideration for the contract; and that the defendant cannot be allowed to repudiate the contract thus, while he enjoys the benefit of it, having never been disturbed in the possession of the property sold to him. *Vibbard v. Johnson*, 19 Johns. 77. *Sumner v. Gray*, 11 Leigh 261, (cited in Am. Law Mag.) It appears farther, that the defendant purchased the horse of Barney with the assent and even as the agent of Finney, the former owner. The sale to the defendant is thereby conclusively affirmed by the only one who could disturb it; and no one else has power to question it.

III. It was also objected, that the contract declared on was void, because it undertook to indemnify the plaintiff from the consequences of his official misconduct. To this we reply;—

1. It should have been left to the jury, whether the plaintiff was knowingly guilty of the misconduct. Bul. N. P. 146. 4 Bing. 66.

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Fletcher v. Harcourt, cited 1 Chit. on Cont. 309. *Coventry v. Barton*, 17 Johns. 142. *Stone v. Hooker*, 9 Cow. 154. *Train v. Gold*, 5 Pick. 380. *Avery v. Holsey*, 14 Pick. 174.

2. The plaintiff had a right to take such an indemnity, when the illegal act was already past. *Fox v. Tilly*, 6 Mod. 225. *Hacket v. Tilly*, 11 Mod. 93. *Geivin v. Driggs*, 1 Caine 460, cited in *Doty v. Wilson*, 14 John. 378. *Kneeland v. Rogers*, 2 Hall 579, cited 1 Com. on Cont. 526, note 1.

Foot & Everts for defendant.

1. The evidence offered by the plaintiff did not sustain his declaration. The declaration alleges that the horse in question was purchased of the plaintiff, and that the agreement to indemnify was entered into with him. These allegations are not supported by proof that the horse was purchased of Jeffrey A. Barney. There was, then, a material variance between the contract declared upon, and the one offered to be proved. The consideration for the promise did not move from the plaintiff; neither was the promise made to him. 1 Ch. Pl. 273. 8 East 9. 2 Ib. 4. Dougl. 665. 15 Vt. 644.

2. Barney was not the agent of the plaintiff, but acted upon his sole responsibility. There was no offer to prove that he was the agent of plaintiff. The contract, when made, was of no validity to bind the plaintiff. The contract was not mutual, and the defendant was not bound. The plaintiff cannot avail himself of this agreement, inasmuch as he was a stranger to the consideration. 8 Mod. 116; Hardr. 321; 1 Vent. 6; 1 Str. 562; 1 Com. Dig. 309, note 1; 16 Wend. 156; 2 Wend. 158.

3. This indemnity was made to secure the office against his own illegal act, for a breach of his official duty. The person making the indemnity was a stranger to the transaction. It appears that the plaintiff and Barney knew at the time that the proceedings under the execution were illegal, but it does not appear that the defendant had such knowledge.

The opinion of the court was delivered by

WILLIAMS, Ch. J. The question, which has been urged on the

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consideration of the court so learnedly and so ably by the counsel for the plaintiff, it appears to us does not arise in this case. The trial was by the court on the issue formed. The evidence is detailed. If any questions of fact were determined by the county court, this finding is not to be questioned here. The contract, on which the plaintiff relies, was made by the defendant, as agent of Finney, with Barney, from whom the consideration passed, and to whom the promise was made.

In the first place, it is a sufficient answer to the present action to say, that whatever promise was made by the defendant was made by him as the agent of Finney, and it is not found by the county court that the defendant either exceeded his authority, or concealed his agency; but the contrary is to be inferred from the judgment rendered; and the fact of his denying his agency on a particular occasion does not change his situation, when from the case itself it is stated that he was such agent.

In the second place, the declaration is not calculated to raise the question presented in the argument. The two special counts in the declaration are upon a sale by the plaintiff to the defendant, and a promise by the defendant to the plaintiff. The evidence tended to show only a sale by Barney, a promise to him, and that the plaintiff had no interest whatever in the property sold,—having, as it is stated, previously sold and parted with all his interest, and received and retained the price and consideration for which he had sold the same. This variance is fatal to any recovery on either of the special counts.

Nor could the plaintiff recover on the evidence on the general counts. We apprehend the rule is truly laid down by Judge Swift, in his digest, that, where “a promise is made to a third person for the benefit of the plaintiff, the declaration must state it to have been made according to the fact; as in the case of father and child;—when a promise is made to the former for the latter, the declaration must state the promise to have been made to the father, though the child bring the action.” Swift’s Dig. 690. The promise, in the case before us, may not have been void on the ground of illegality, inasmuch as a sheriff may take an indemnity for a *past* neglect. Yet, as the plaintiff passed no consideration to the defendant, if he

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can be considered as having paid money at the request of any one, it must have been at the request of Barney, and not at the request of the plaintiff. For these reasons we think, that, under any view of the law on the subject of the parties to a contract, who may maintain an action on the same, the present action could not be supported on the facts which were in evidence.

Having this view of the present case, it would seem to be a work of supererogation to examine critically the question which has been so elaborately and ably argued. It is, however, due to the occasion to say, that we adhere to the rule which has been formerly expressed in the case of *Pangborn v. Saxton*, 11 Vt. 79, and in *Crampton v. Ballard*, 10 Vt. 251,—which latter case was again before the court at a subsequent term,—that the legal interest in a contract is in the person to whom the promise is made, and from whom the consideration passes; and consequently he is the person who must bring the action; and if there are any cases which seem to be at variance with this, they are to be considered as exceptions to the general rule; and a party, unless he bring himself strictly within the exception, must be governed by the general rule.

The case of *Dutton and wife v. Pool*, reported in 2 Lev. 210, 1 Vent. 317, T. Raym. 302, has been considered as forming an exception to this rule, and probably for that reason TWISDEN, J., limits the rule adopted in that case to agreements made by parents on behalf of their children. It has always appeared to me, however, that the circumstances of that case warranted the decision, without impugning the general rule but in a slight degree. The transaction, out of which the case arose, was but four years after the passing of the statute of distributions, previous to which the administrator was entitled to the personal estate, and the bonds taken from him to make distribution were adjudged void. It was usual at that time, and indeed the only way, to provide for children, except the eldest son and heir, by settlement. The ancestor, Sir Edw. Pool, was about to make such a provision and settlement for his daughter, by cutting down the timber trees on his estate. The heir promised, in case he would forbear to cut down the trees, that he would pay the daughter £1000. The ancestor desisted, the estate, with the timber, descended to the heir, who was the defendant, and the

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daughter, with her husband, who married after the promise, brought the suit. It was resisted by the heir on the ground that the action should have been brought by the executors of the father; but the objection was overruled and the action sustained, after many arguments. It is no where stated who was the executor; and perhaps it might have been the defendant.

It is apparent, that, unless the action could have been maintained as it was, the whole object of the contract would have been defeated. The money recovered would have gone into the mass of the estate, to be distributed, and the daughter would have been entitled to only a part of the provision intended for her equally with the defendant. That the court should have hesitated, before they came to that result, was to be expected, and is decisive that they considered the general rule not lightly to be departed from. It appears to me that the daughter, in that case, lost an interest in consequence of the promise of the defendant, and which she would have had, but for that promise, and that interest came to the defendant, and he had the benefit of it; and it did not require any very subtle reasoning, or a stretch of principle, to enable the plaintiff to recover. The consideration did not pass from her, when she lost her settlement; and the defendant, who received the same, might have been considered as making the promise directly to her.

In the case before us the contract was an entire contract, to wit, to pay fifteen dollars and indemnify, &c. Barney was therefore interested in the contract to the extent of the money to be paid. Barney did not stand in the situation of a parent, bound to provide for this plaintiff. And if relationship is to be taken into the account, in determining who has the legal, or even beneficial interest in a contract, this relationship cannot be extended beyond parent and child, or husband and wife. It surely cannot be contended that a contract for the benefit of remote relations, or friends, can be enforced by them, when the consideration does not proceed from them, and the person who advances the consideration is under no obligation to provide for, or advance, that relation and friend.

The plaintiff parted with nothing, and lost nothing, in consequence of the promise of the defendant, he having previously sold the horse to Barney and received the pay therefor. He does not

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therefore bring himself within any of the exceptions, which have been engrafted on the rule, that the person, from whom the consideration proceeds, and to whom the promise is made, can alone maintain an action thereon. In every view, which we have been enabled to take of the case, the plaintiff is not entitled to recover, in this action, of the defendant.

The judgment of the county court is therefore affirmed.



HENRY STANLEY v. SAMUEL MCCLURE.

If a judgment creditor take out execution against the *body* of the defendant, when the judgment was recovered in an action founded upon a contract entered into subsequent to the first day of January, 1839, and the body of the debtor be arrested thereon, such execution will be set aside upon *audita querela*.

The remedy by *audita querela* is, in such case, concurrent with the remedy by motion.

AUDITA QUERELA. The complainant alleged that he was an inhabitant of this state, and that the defendant had recovered a judgment against him in an action founded upon a contract entered into subsequent to the first day of January, 1839, and that the defendant "without right, and contrary to the provisions of the statute law of this state," took out an execution upon such judgment, directed to any sheriff, &c., and commanding the sheriff, for want of goods, chattels, or estate of the complainant to be found, to arrest the complainant and commit him to jail, and that the defendant had delivered the said execution to an officer to serve, and that the complainant had been arrested thereon and was then in custody. The defendant pleaded not guilty, and issue was joined to the court.

Upon trial, the county court found the facts to be as alleged in the complaint. The defendant then filed a motion in arrest of judgment, for the insufficiency of the complaint, which motion the court overruled, and rendered judgment in favor of the plaintiff. Exceptions by defendant.

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C. B. Harrington for defendant.

1. The result of the decisions in this State has been, that the writ of *audita querela* will relieve when there has been a valid judgment and a subsequent discharge upon it, or when a judgment has been rendered against a defendant without notice to him. And the supreme court say that this writ has never been extended farther. *Dodge v. Hubbell*, 1 Vt. 491. *Staniford v. Barry*, 1 Aik. 321. *Finney v. Hill*, 13 Vt. 225. 2 Bl. Com. 313.

2. The statute,—Rev. St. c. 28, § 63,—which abolishes imprisonment for debt, does not declare that the issuing an execution *against the body*, where the judgment was rendered on a contract entered into subsequent to the first day of January, 1839, is illegal, but only that the body of the debtor, shall not be *arrested*, or *imprisoned*, thereon. The issuing of both *mesne* process and execution against the body is authorized by statute. If, then, this execution was issued legally, and in legal form, the fact that the complainant was illegally *arrested thereon* cannot make it void *ab initio*, nor can it, for that reason, be set aside. The complainant has ample remedy by *habeas corpus*, and whatever damages he has sustained might be recovered by an action for false imprisonment. Rev. St. 223, § 1.

R. Pierpoint for plaintiff.

The writ of *audita querela* is in the nature of a bill in equity, brought for relief against the oppression of the defendant, either by setting aside the execution for a cause arising after judgment, or by setting aside the judgment, on the ground that the defendant has not had his day in court. 3 Bl. Com. 404, 405. 1 Bac. Abr. 193. 1 Vt. 437. It is the appropriate, and, in this state, the only adequate remedy, when the party is pursued with an execution illegally taken out upon a valid judgment. 1 Aik. 366. Here the execution illegally issued,—Rev. St. 187, § 63,—and the complainant was, by direction of the defendant, illegally arrested. In what way is he to be relieved, but by *audita querela*? That is the most appropriate, and the most convenient, method, for protecting the rights of the parties. If an execution issue illegally, it will be set aside by *audita querela*, or upon motion; *Johnson v. Harvey*, 4

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Mass. 483; or, if regularly issued, but irregularly levied; *Hurlburt v. Mayo*, 1 D. Ch. 387; *Jameson v. Paddock*, 14 Vt. 491; *Phelps v. Slade*, 13 Vt. 195.

The opinion of the court was delivered by
BENNETT, J. This is an *audita querela*, brought to set aside an execution, issued upon a judgment rendered in an action founded upon a contract, entered into since the first day of January, 1839. The execution issued against the body of the judgment debtor, and he had been taken into custody by the officer, who had the execution for collection. As, in such case, the execution should issue only against the estate of the debtor, and not against the body, this execution issued against law, and would, no doubt, have been set aside upon motion; and it is contended that there can be no relief by *audita querela*.

It is true that the process of *audita querela* does not bear upon the judgment of the court, but upon the acts of the opposite party. There is no complaint in this case of the proceedings of the Court, but the party has taken an illegal execution, and attempts to have it executed. The process of the court is used to effect an illegal purpose, to the injury of the complainant, and he has had no opportunity of being heard in court. There are cases in the English books, showing that where an *elegit* has issued, and the sheriff has delivered to the creditor lands, upon which the *elegit* was not extendable, the levy may be avoided by an *audita querela*. In *Johnson v. Harvey*, 4 Mass. 483, it was held that an execution, irregularly issued upon a regular judgment, might be set aside, either upon motion, or *audita querela*. In *Hurlburt v. Mayo*, 1 D. Ch. 390, an execution was, upon *audita querela*, set aside upon the ground that there had been a fraudulent levy made of it upon real estate. One piece of land, of less value, was caused to be appraised, and the return upon the execution was made to embrace a different piece, of greater value.

In the case before us the execution was wrongfully issued against the body. The creditor is attempting to make use of it, for the illegal and oppressive purpose of restraining the complainant of his personal liberty. Though the complainant might have a summary

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relief by motion to set aside the execution, yet we think the *audita querela* must be, in this case, a concurrent remedy; and, in many instances, it would be the only adequate remedy.

The judgment of the county court is affirmed.



DAVID KIRKALDIE v. THOMAS PAIGE.

Where the declaration, in an action for slander, consisted of two counts, the one for words charging the plaintiff with perjury, and the other for words charging him with theft, and the plaintiff introduced evidence in support of both counts, it was held that he might, at any time before verdict, abandon one count, and that there was no error in the court in permitting him to do so, and in directing the jury to lay out of the case all the testimony, applicable to that count, which had been introduced.

Where, in an action for slanderous words, there was an attempt on the part of the defendant to impeach the credit of the witnesses by whom the speaking was proved, it was held that the plaintiff was entitled to prove, as tending to sustain the credibility of the witnesses, that the witnesses resided in the State of New York, and that the defendant had, by *solicitation, money, and threats*, endeavored to induce them to decline attending court and testifying in the case. **HEARD, J.**, dissenting.

But such testimony would not be admissible, to prove *malice* on the part of the defendant.

TRESPASS ON THE CASE for speaking slanderous words. Plea, the general issue, and trial by jury.

The declaration consisted of two counts, in the first of which the plaintiff alleged that the defendant had spoken words imputing to the plaintiff the crime of perjury, and, in the second, words imputing to him the crime of theft. On trial, the plaintiff introduced two witnesses, both of whom testified to the speaking, by the defendant, of the words charged in the first count of the declaration, and one of them testified to the speaking, by the defendant, of the words charged in the second count. The plaintiff was then permit-

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ted by the court, notwithstanding objection made by the defendant, to prove by the same witnesses, that they resided in the state of New York, and that the defendant had endeavored, by solicitations, money, and threats, to induce them to decline attending court, or testifying against him. The defendant introduced testimony tending to discredit both of said witnesses, and the plaintiff introduced testimony tending to sustain their credit.

After the testimony in the case had been closed, the plaintiff stated that he should abandon the first count in his declaration, and go for a verdict upon the second count only,—to which course the defendant objected. The court took the objection into consideration, and directed the argument of the case to proceed to the jury; the case then proceeded in argument,—the plaintiff claiming a verdict upon the second count only,—until the closing argument for the plaintiff, when the court decided that the plaintiff might abandon his first count; and, on the argument being closed, the court instructed the jury to lay the first count, and all the testimony in relation to it, out of the case.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

Thrall & Pond for defendant.

I. It is contended, on the part of the defendant, that the evidence of the defendant's solicitation of the plaintiff's witnesses was totally irrelevant, and ought to have been rejected by the court.

1. The acts of the defendants were no admission that he had uttered the words imputed to him; but their only tendency was, to show that he intended to defend the suit, which the plaintiff had commenced against him.

2. But admitting that the tendency was to show the speaking of the word, by the defendant, yet, inasmuch as they were acts performed after the commencement of the plaintiff's action, they were not properly admissible in evidence. The decisions upon this question, by the courts in England, are contradictory; Lords Kenyon, Ellenborough, and Mansfield have alternately received and rejected such evidence, and therefore the question may be regarded as unsettled here. *Charlter v. Barrett*, Peake's Cas. 22. *Mead v.*

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Daubigny, Ib. 125; *Lee v. Huson*, Ib. 166; *Rustell v. Macquister*, 1 Campb., note 49; *Stuart v. Lovell*, 2 Stark. R. 93; *Finnerty v. Tipper*, 2 Campb. 72. The admission of such testimony has been regretted and condemned by nearly every court, by whom the question has been discussed. *Thomas v. Croswell*, 7 Johns. 270; *Inman v. Foster*, 8 Wend. 602. *Miz v. Woodward*, 12 Conn. 292. This court should adopt such a rule, as will hereafter effectually silence such regrets and cavillings, and one that will not deserve them.

II. But should the court think that the evidence was admissible, we then contend that the jury should have been told not to give damages therefor. See Stark. on Slander, 290, and the cases before cited, and also 4 Wend. 138. It is like a case, where evidence is admissible in support of one count only, when there are two counts in the declaration. In such case it is error to admit testimony *generally*, unless the jury are properly instructed in regard to its application. *Vail v. Strong*, 10 Vt. 457.

III. The defendant farther contends, that the court below erred in permitting the plaintiff to abandon the first count in his declaration, at that stage of the proceedings, after having given evidence in relation thereto to the Jury. The authorities cited in support of the decision do not sustain the position. The language used by Chitty, and also by Sergeant Williams, in his notes to Saunders, sustain us in this position. "Where it appeared by the judge's 'notes that the jury *calculated* the damages on evidence applicable 'to the good counts only, the court will amend the verdict,' &c. 1 Chit. Ib. 394. 2 Saund. R. 171, note. This conclusively shows that the cases, where this is proper, are where the damages rest in calculation, or computation, merely, and not in the discretion of the jury. *Eldowes v. Hopkins et al.*, 1 Doug. 376; *Mayo v. Archer*, 1 Str. 513. *Williams v. Breedon*, 1 B. & P. 329.

S. S. Phelps, of counsel for the defendant, submitted an argument in writing,—contending that the evidence admitted by the court, in reference to the defendant's practices with the plaintiff's witnesses, was wholly irrelevant,—1, Under the *pleadings*, the declaration giving no notice to the defendant to be prepared to meet

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this proof,—2, In reference to the *subject matter* of the suit, the charge in this declaration being for speaking slanderous words, and the proof tending to prove an entirely distinct offence,—3, That it was inadmissible in aggravation of damages, as it tended, not to show an *injury*, but only an *attempt* at injury, and the injury, if any had resulted, could not be said to be the *immediate* consequence of the slander, which, alone, can be taken into consideration,—4, That it was not admissible as tending to prove *malice*, inasmuch as the only *subsequent* acts of the defendant, in actions for slander, which are admitted to be proved for this purpose, are those which tend to injure the plaintiff's character, and the commission of these acts by the defendant could be accounted for in other ways, than by supposing malice,—and 6, That the admission of such testimony would be positively pernicious, as tending to put in issue, not the merits of the case on trial,—but the character of the parties, and the expedients to which they had thought it advisable to resort, in order to bring about a successful result in the suit.

Foot & Everts and *E. L. Ormsbee* for plaintiff.

I. The fact, that the defendant had endeavored by money and threats to prevent the witnesses from attending court, or from testifying against him, was admissible.

1. It shows malice *in fact*, or, in the language of the cases, "*actual malice and vindictive motives*," on the part of the defendant; such testimony is clearly admissible, both upon precedent and principle; 4 Phil. Ev. 245,—Cow. & Hill's Ed.; *Bromage et al. v. Prosser*, 10 E. C. L. 321; *Inman v. Foster*, 8 Wend. 609; Saund. Pl. & Ev. 808; 19 Wend. 296; Stark. on Sland. 398-9; Peake's Cas. 166, 125; 4 Wend. 138-9; 1 Campb. 49.

2. The act proved on the part of the defendant was a virtual admission, that the testimony of the witnesses in chief was true. It was also admissible as tending to *sustain their credit*, an attempt having been made to impeach them.

II. That evidence was given, applicable to the other count in the declaration, cannot be the ground of a new trial, as the jury were instructed to lay that count out of the case, and all the testimony relating thereto. Other libels may be given in evidence,

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where the jury are instructed not to give damages for them. See the cases above cited.

III. It is the right of the party to abandon any part of the claim before judgment, and it results in no injury to the defendant. "In case there be an insufficient count, if the mistake be discovered before verdict, it is expedient to strike it out by leave of the judge, or enter a *nolle prosequi* as to such count; or, *on the trial, to take a verdict only on the sufficient counts*; so, where it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good counts only, the court will amend the verdict by entering it on those counts, though evidence was given applicable to the bad counts." Chit. Pl. 354; 2 Saund. 171; Doug. 730; 1 Bos. & Pull. 329; 7 Cow. 725. In *Genet v. Mitchell*, 7 Johns. 120, it was held that the plaintiff might abandon one part of the libellous matter, in any count, on the trial, and that the part abandoned might be used in connection with the part retained, to show its meaning. *Gould v. Weed*, 12 Wend. 21. The jury returned a verdict upon one count, in this case, and, like a special verdict, nothing can be intended, but what is found by the jury. 1 Wils. 55. Hob. 62.

The opinion of the court was delivered by

BENNETT, J. The slanderous words in the first count charge the plaintiff with the crime of perjury, and those in the second with the crime of theft. On the trial it seems testimony was given tending to prove both counts, but the plaintiff was permitted to abandon his first count, and the court directed the jury to lay that count, and all the evidence relating to it, out of their consideration. This is now claimed as matter of exception; but we do not think that there was any error in the proceedings of the county court in this particular. The rule of practice is thus laid down by Chitty, in his treatise on pleading, Vol. 1, p. 394; in case "there be an insufficient count, if the mistake be discovered before verdict, it is expedient to strike it out by leave of the judge, or to enter a *nolle prosequi* as to such count, or, at the trial, to take a verdict on the sufficient counts." So, where there has been a general verdict, and evidence given only on the good counts, the practice has been

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for the court to permit the verdict to be amended by the judge's notes; and even though evidence be given applicable to the bad count, yet if it appear by the judge's notes that the jury calculated the damages on evidence applicable to the good counts only, the verdict will be amended.

In the case now before us, there could be no possible objection to the course adopted by the county court. The slanderous words charged in the two counts are entirely distinct and independent, and there could be no confusion in the minds of the triers as to what evidence was applicable to each count. Besides, it might well be enquired, whether it was not matter resting wholly in the discretion of the county court, and in no event matter of error.

The only question, with which we have had any difficulty, is in relation to the admission of the testimony, which was objected to. After the plaintiff had introduced two witnesses, to prove the speaking of the words, he proposed to prove that the defendant had, by *solicitation, money, and threats*, endeavored to induce these witnesses, who resided in the state of New York, to decline coming to court, or testifying against him. This testimony was admitted, and, if not admissible, the case must be opened.

It is said, in argument, that this was proper evidence to show malice. But I cannot conceive how this has a tendency to show the *quo animo*, with which the words might have been spoken. There seems to be no possible connection between them in this particular. The question, then, arises, has this testimony any tendency to confirm the witnesses, who had testified to the speaking of the words? And can any presumption be drawn from such improper conduct of the party, in relation to the fact of his having spoken the words charged in the declaration? We sometimes infer an *effect* from the proof of an *adequate cause*; and sometimes, upon the proof of an *effect*, we infer the *cause*. The improper conduct of the defendant, in attempting to keep the plaintiff's witnesses from giving testimony, must have had a *motive*, a cause adequate to produce such an effect; and I think the most natural motive, for such conduct, is, to attribute it to his supposed knowledge, that the truth would operate against him. Mr. Greenleaf, in his admirable treatise upon evidence, p. 42, sec. 37, well says, "that

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the presumption of innocence may be overthrown, and a presumption of guilt raised, by the misconduct of the party in suppressing or destroying evidence, which he ought to produce, or to which the other party is entitled." Roscoe's Evid., p. 14, has the same principle.

If a man is accused of an offence, and, upon being charged, has fled, or endeavored to make his escape, this is competent evidence to go to a jury, as tending to overcome the presumption of innocence, and raise a presumption of guilt. So the introduction of a falsehood into the defence has a like effect against the prisoner. The spoliation of papers, material to show the neutral character of a vessel, furnishes a presumption against her neutrality. *The Pezarro*, 2 Wheaton 227. In *Armory v. Delamire*, 1 Strange 505, where the finder of a lost jewel would not produce it on trial, the jury were directed to presume it to be of the highest value of its kind. While in *Chunnes v. Pezzey*, 1 Campb. 8, where the defendant had been guilty of no improper conduct, and the only evidence was of the delivery to him of the plaintiff's goods, of an unknown quality, the presumption was held to be in his favor, and that the goods were of the cheapest quality. The case of *Downer v. Bowey*, 12 Vt. 452, is somewhat in point. In that case it was held that the poverty of an execution debtor was admissible, as having some tendency to prove that the execution might have been delivered to the sheriff with instructions not to commit the debtor without *express* direction. That case went upon the ground, that the poverty of the debtor furnished a *motive*, why such instructions might have been given, though the presumption is a very slight one arising from such a fact.

Though it is true, as argued at the bar, that the defendant might have had other motives, and not the one we have assigned, why he wished to keep the plaintiff's witnesses from coming to court, yet we think it is by far the most rational motive to suppose that he felt self convicted that he was in the wrong, and that this would be made manifest on trial if these witnesses should appear. Though the presumption might be slight, derived from such a source, and should be acted on with great caution, yet a majority of the court think the evidence was properly admitted. The jury should judge

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of the *motive* of such conduct in the defendant, and if, upon the whole case, they were satisfied that it proceeded from some motive, other than the one the most *obvious*, they would give no effect to this testimony against the defendant.

It does not appear, from the bill of exceptions, for what particular purpose this evidence was offered, or admitted by the court. If admitted to show *malice* in the defendant, or if the jury had been instructed to consider it in that view, there would, we think, have been error. No question is raised in the case in regard to the charge of the court, no complaint is made, that the court omitted to give proper instructions to the jury on this evidence, or that they gave those which were improper. This is not to be presumed. The bill of exceptions must show *affirmatively* that there has been error.

The result is, that the judgment of the county court is affirmed.

HEBARD, J., dissenting.



WILLIAM E. HASKINS v. SENECA SMITH, NATHAN J. SMITH AND
ALEXANDER P. ALLEN.

In the caption of a deposition, all parties, both plaintiffs and defendants, must be individually and correctly named.

The receiptor of property attached is not a competent witness for the defendant in the same suit, when the property attached has been, by the receiptor, suffered to remain in the defendant's possession.

And the presumption will be, that the property has remained in the defendant's possession, unless the contrary is shown.

And the court, in such case, have no authority to allow the defendant to pay to the clerk of the court a sum equal to the receiptor's liability to the attaching officer, and then discharge the attachment, or the attaching officer's liability, so as to render the receiptor a competent witness.

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The fact, that a witness was rejected on the trial of a case, as being incompetent through interest, is not a sufficient reason for granting a new trial, as for a surprise.

So, where the party, on trial, proved the execution of a promissory note, and the indorsements upon it, as collateral evidence in the case, and laid the note upon the table without reading it to the jury, or giving notice to the court that it was put into the case, it was held no ground for granting a new trial, for a surprise, that the court, after the argument had commenced, refused to allow the party to comment upon or use the note as evidence in the case.

TROVER for certain promissory notes. Plea, the general issue, and trial by jury.

On trial, after the plaintiff had introduced evidence tending to prove that the defendants had received and converted to their own use the notes described in his declaration, the defendants offered as a witness one George O. Vail, to prove that the said notes were pledged to the defendants S. & N. J. Smith by the plaintiff as security for certain advances and payments which they had made for him. To the admission of this witness the plaintiff objected on the ground of interest, and proved that the witness had executed to the attaching officer a receipt for the property of the defendants, attached upon the writ in this suit; and no evidence was introduced to prove that the property was in the possession of the receptor, or that the receipt had ever been discharged. Upon this evidence the court adjudged the witness incompetent. The attaching officer then refusing to discharge said bail from his liability as receptor, the defendants brought into court, and offered to deposit with the clerk, the sum of \$800, (which was the amount for which the officer was commanded in the writ to attach property,) and moved the court to discharge the attachment, or release the officer from his liability thereon. But the court decided that they had no power to discharge the attachment, "or to give any other relief to the defendants," so as to make the said bail a competent witness for them, and excluded him from testifying.

The defendants also offered in evidence the depositions of Eunice Vail and Eunice V. Vail, the captions of which were each in the following words; "The above deposition taken at the request of

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'Seneca Smith and others, to be used in a cause to be heard and 'tried by the county court" &c., "in which cause Wm. B. Haskins is plaintiff and Seneca Smith and others are defendants," &c. To the admission of these depositions the plaintiff objected for the informality in the captions, in not stating the names of the defendants; and the court sustained the objection and excluded the testimony. The depositions were taken with notice, and the adverse party attended at the time they were taken.

The jury returned a verdict for the plaintiff. Exceptions by defendants.

And now at the present term of the Supreme Court, the defendants preferred their petition for a new trial in the case, on the ground that they were surprised by the exclusion of George O. Vail as a witness, as above mentioned, and alleging that the said Vail had been admitted as a witness, without objection, to testify to the same facts which the defendants now expected to prove by him, at two previous trials of this case. They also alleged that they gave evidence on the trial of the case, among other things, tending to prove that they made a payment, at the request of the plaintiff, to one William Johnson, upon certain notes which the said Johnson held against the plaintiff, and that the plaintiff, prior to their making such payment, agreed to secure them therefor, and also for what he then owed them, by pledging to them the notes for which this action was commenced; that the plaintiff, not denying his agreement to give security to them for such payment, pretended, and introduced evidence tending to prove, that, as security for such payment, he delivered to them certain notes which he held against one Reed, and that he did not pledge to them the notes now sued for; that thereupon they produced the notes which Johnson held against the plaintiff, on which were indorsed the sums so paid by the defendants, which sums greatly exceeded the amount due upon the notes against Reed,—which notes were also in evidence,—the amount of which, as the petitioners contended, would have tended strongly to convince the jury that the defendants must have required from the plaintiff a greater amount of security than the sum due upon the Reed notes, for the payments which they were then about to make; and the petitioners farther alleged, that, after they had proved the

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genuineness and identity of the said Johnson notes, and the indorsements upon them,—of the amount of which indorsements they gave no other evidence,—they handed the said notes to the counsel for the plaintiff, with an intimation that they put said notes in evidence, to which no objection was made; and that the defendants' counsel fully supposed that said notes and indorsements were in evidence, and relied upon their being so, until the argument of the case had commenced, when, to their great surprise, the court decided that said notes were not in evidence, and refused to allow them to be commented upon to the jury.

The petitioners also alleged, as a reason why a new trial should be granted, that the jury had been improperly practised with, while they had the case under consideration; and also, that since the trial they had discovered new and material testimony;—but both these grounds were abandoned upon the final hearing.

Affidavits were filed in support of the petition, the substance of which are sufficiently shown by the opinion of the court.

S. H. & E. F. Hodges for defendants.

1. The judgment should be reversed on account of the rejection of George O. Vail as a witness. The presumption is, that the property receipted was still in his possession, to be re-delivered to the officer, or returned to the defendants. His interest, therefore, was balanced.

But, whatever might be the effect, had the court merely refused to exercise their discretion, they erred again in deciding that they had no power to let in the witness. A deposit of money to a sufficient amount with the officer of the court purges the interest of a witness, who is responsible to one of the parties for the payment of the judgment. *Cowen & Hill's* notes to Phil. on Ev. 264, 265, 1565, 1568–1570. *Gilpins v. Consequa*, 1 Pet. C. C. Rep. 901. *Collins v. Mc Crummen*, 3 Martin's (La.) Rep., N. S. 166. *Roberts v. Adams*, 9 Greenl. 9. *Mynn v. Joliffe*, 1 Mood. & Rob. 329. *Allen v. Hawks*, 13 Pick. 79, 85. *Beckley v. Freeman*, 15 Ib. 468. *Bailey v. Hale*, 3 C. & P. 560. *Pearcy v. Fleming*, 5 C. & P. 429.

2. The depositions rejected were admissible. If it appears that

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they were taken at the request of one of the defendants, it is of no consequence who else united in the request. Neither is there any occasion for the magistrate to know who are joined in the suit with the party, requesting the taking of the deposition, since he is to certify nothing respecting them. We submit, farther, that objections of this character are entitled to no weight, when depositions are taken with notice.

3. The petition for a new trial should be granted. The introduction of the Johnson notes was essential to a just understanding of the cause; and it was no fault that they were not read. The testimony of George O. Vail was of vital consequence. The exclusion of both these sources of evidence was a great surprise to the defendants, and entirely defeated their preparations. The course of the plaintiff respecting this witness betrays also a want of fairness, which demands that a verdict, obtained by such practises, should be set aside.

J. C. Dexter and Ormsbee & Edgerton for plaintiff.

1. George O. Vail was properly excluded, as having a direct interest in the result of the suit.

2. Every thing that was offered by the defendants was merely in the nature of additional security to the officer. The offer, if complied with, tended to secure the officer against loss, but did not release him from liability.

3. The language used in the captions of the depositions was not sufficiently descriptive of the parties.

4. As to the petition for a new trial,—if the county court were right in their decision as to George O. Vail, it is not perceived how his testimony could be obtained at a future trial;—and perhaps, under the petition for a new trial, it may not be irrelevant for the court to consider the fact, that it has once been admitted, without changing the verdict.

The evidence to be derived, if any, from the Johnson notes would have merely been in some slight degree cumulative, if, indeed it would have added any thing to the evidence bearing upon that point already in the case.

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The opinion of the court was delivered by

WILLIAMS, CH. J. In this case there are exceptions to the decisions of the county court upon the trial, and there is also a petition for a new trial.

The first exception is, that the county court improperly excluded the depositions of Eunice Vail and Eunice V. Vail. The decision was conformable to the decision of this court in the case of *Dupy v. Wickwire*, 1 D. Ch. 237, and also in the case of *Swift v. Cobb*, 10 Vt. 282. Indeed the latter is almost identical with the one at bar. In the caption to a deposition the parties must be correctly described, and, in order to this, the christian and surnames of the parties, both plaintiff and defendant, must be set forth. It is neither a correct, nor accurate, description of the parties defendants, to name them "Seneca Smith and others." A judgment rendered in the name of a firm and an execution issuing thereon were adjudged void in the case of *Gray, Drew & Co. v. Parker*, 16 Vt. 652.

The second exception is, that the court excluded George O. Vail as a witness. It appeared that the property of the defendants in this suit was attached, and the witness offered receipted it to the officer making the attachment. The usual course, when property is thus attached, is, that it goes back to the defendant, and the receiptor becomes a surety for him for the value of the same; and the presumption is always conformable to this usage, until the contrary is shown. The party introducing a witness, situated like the one in question, could, if such was the fact, show affirmatively that the property attached remained in the hands of the receiptor. The party opposing the introduction of the witness could not show the contrary, unless he resorted to the testimony of the witness himself, on his *voir dire*. This he is under no obligation to do. The witness offered was apparently interested in behalf of the party, and was properly rejected.

A question is then raised, whether the court should, on the offer made by the counsel for the defendant to bring the sum of eight hundred dollars into court, have discharged the attachment, released the officer from his responsibility, and admitted the witness to testify. We apprehend it was not within the legitimate and appropri-

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ate power or duty of the court below to discharge the attachment, or release the officer from his responsibility, or interfere in the contract between him and his receiptor. It is not the appropriate business of the clerk to receive and take care of property attached, or of money deposited in lieu thereof. The plaintiff, if he recover, may in such a case resort to the officer attaching, and his sureties, and is not to call on the clerk or officer of this court for money, which it is not his official duty to keep, and for the safety of which his official sureties are not responsible.

This was the only offer made, and the only decision excepted to, and the only one of which this court can take notice. The remark which is brought into the bill of exceptions, that the court had no power to *give any other relief*, can be considered as only applicable to the case then presented; and on that we have already considered that the court could not grant any relief. If any thing farther was meant, or intended, by that expression in the exceptions, I have only to say, that it would have been improper for the counsel to ask the court how they could render the witness admissible, or for the court to decide that under no possible circumstances they could admit him. It is sufficient to say, that, under the circumstances presented to the court below, and the offer made, the court correctly decided that they could not discharge the attachment, or give any other relief to the defendants.

What powers the courts of Great Britain have in discharging bail, or substituting other security, is of no consequence in this case. In all the cases read the bail were, by order of court, absolutely discharged, and their names stricken from the bail piece; and a similar power is exercised in this State in relation to changing bail. But no such power is ever exercised here in relation to attachments, and, from the nature of the case, cannot be. We can neither increase the amount of a receipt, nor change the receiptor to make him a witness. The cases in Massachusetts, from *Pickering*, decide only this, that, when the receiptor has received of the party a sum in money equal to the value of the property receipted, he stands in the same situation as though he had the goods in his custody. It did not enter into the minds of the counsel for the defendants to adopt this course, and entrust the receiptor with the

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money with a view to make him a witness, and the court was not called on to decide, whether, under such a state of facts, the witness would have been competent. The decision of the county court was right on all the questions raised by the bill of exceptions.

The petition for a new trial is presented for three causes. 1. New discovered evidence. This is now abandoned. 2. For that the agent of the plaintiff practised with the jury. This, also, is abandoned, and no evidence has been taken to sustain it. A charge of this kind ought not to be made and placed on the records, when there is no attempt to support it by proof. The charge is of a grave and serious nature; and, unless the party has some proof, or pretence, for making it, it ought not to be inserted in the petition. 3. Surprise in rejecting the testimony of Vail, and also in not putting in evidence certain notes. This ground of an application for a new trial, viz. surprise, is scarcely ever tenable; and, indeed, it is not laid down as a reason for granting a new trial in any of the modern authorities.

In this case there is no foundation whatever for this allegation of surprise. Vail was interested,—was, as it is said, an important witness; the defendants could not with safety expect, or believe, that the plaintiff would not avail himself of the objection; nor could the objection to the witness, or the decision of the court, be unexpected.

In relation to the notes, the party had no reason to suppose them in evidence, when they were not offered, or read, and no note was taken of them. Courts are usually liberal in granting continuances on trial, on such terms as they deem expedient. The defendants did not move for a continuance for this cause, but took the chance of a verdict in their favor on the testimony introduced. The notes and the indorsements contained but little evidence of any importance. To have admitted them on the argument would have operated injuriously to the plaintiff, who said he had had witnesses in attendance to disprove the indorsements. An appeal on the part of the plaintiff for a new trial on the ground of surprise, if the verdict had been against him, would have presented a stronger appeal to our discretion than is now presented.

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In the exercise of our discretion we think we ought not to open this case for another trial, when there has been such a multiplicity of testimony, and so many trials, and when the case has been so greatly contested.

The judgment of the county court is therefore affirmed, and the petition for a new trial is dismissed.



CALEB HALL v. IRA PARSONS.

[Same Case, 15 Vt. 358.]

A concurrent possession of personal property by the vendor and vendee, after the sale of the property, renders the sale fraudulent *per se*, as to the creditors of the vendor; but the joint possession, to have that effect, must appear to be of the same description, in the use, occupancy and disposition of the property, as that of joint owners.

What constitutes a concurrent possession is a question of law, to be determined by the court; but the jury must decide what facts, tending to show such possession, are established by the evidence.

And the same change of possession, which is required in case of the sale of personal property, is required where personal property is assigned for the benefit of the assignee, as creditor of the assignor, and, after payment of his claims, for the benefit of the creditors generally of the assignor.

But where the property assigned, in such case, consisted of a store of goods, and the assignee was the owner of the store, and of the land on which it stood, and, immediately upon the execution of the assignment, took down the sign of the assignor, and hired anew the clerk who had been before employed by the assignor, and took the *control* of the store, and opened a new set of books, and was present personally in the store most of the time after the assignment, attending to the business of the store, and until the time the goods were attached as the property of the assignor, it was held that a joint possession by the assignee and assignor, sufficient to render the sale fraudulent in law as against the creditors of the assignor, was not established by proof that the assignor, after the assignment, continued in the store, and assisted in making an inventory of the goods, and that he, and the clerk previously employed by him, continued, while making the inven-

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tory, to sell goods to the customers, and that, when the inventory was completed, the assignor took the books to his own house and posted them, and made settlements with those who had accounts thereon, and, when balances were found against him, gave memoranda of the amount, to be carried to the store, where the amount¹ was paid in goods, and that, after about a week, the books were returned to the store, and, from that time, the assignor was in the store, settling with his customers, taking notes and pay for balances due, and, when the balances were against him, paying therefor in goods out of the store, and also, by the consent of the assignee, paying in goods from the store his outstanding due bills which were made payable in goods, and that he sold goods, and waited upon customers, and took goods for the use of his family, which were charged to him upon the books of the assignee, and had, in many instances, the sole charge and care of the store, selling goods and taking pay, in the absence of the assignee and of the clerk.

TRESPASS, brought to recover the value of certain property, attached by the defendant, as sheriff, as the property of one Caleb B. Hall. Plea, the general issue, with notice, and trial by jury.

On trial the plaintiff gave in evidence an assignment to himself, dated January 27, 1840, from Caleb B. Hall, of all the goods, &c., then in the store occupied by said Caleb B. Hall, agreeably to an inventory to be made out, and of which the goods attached were a portion, and also of certain other property, both real and personal, for the purpose, as specified in said assignment, first, of paying all the debts of said Caleb B. Hall for which the plaintiff was holden as surety, next, of paying the amount the plaintiff had paid for the said Caleb B. Hall, and then to pay, equally, the other debts of the said Caleb B. Hall.

The plaintiff then introduced evidence tending to prove that said goods were in a store belonging to the plaintiff, which the said Caleb B. had been occupying for some years, as a store, by license of the plaintiff, and that John M. Hall was his clerk; that on the day of the assignment the plaintiff told Caleb B. Hall to inform John M. Hall that he wished him to stay as his clerk until spring, and that then, if the plaintiff purchased new goods, he should want him to continue; that Caleb B. communicated this to John M.; that the next morning the plaintiff went to the store and took down the sign, and gave directions, and took the control of the store, and the invoice

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of the goods, which had been previously begun, was finished by Caleb B. Hall and John M. Hall; that from that time, which was the 27th of January 1840, to the time of the attachment, which was the 17th of February, 1840, the plaintiff continued to give directions, and to control the business of the store; that, at the time of the attachment, the plaintiff's claims against the said Caleb B., in debts and liabilities for him, amounted to four thousand and one hundred dollars, and that the real estate, conveyed and included in the assignment, amounted to one thousand dollars, and the notes and accounts assigned amounted to two thousand two hundred dollars, and the goods and personal property to about three thousand one hundred dollars.

The plaintiff's testimony tended farther to shew, that the said Caleb B. Hall, at the request of the plaintiff, boarded the clerk, and that he took the books to his own house, and posted them up, and then returned them to the store; and that also, at the request of the plaintiff, the said Caleb B. had at times assisted in handing down and selling goods, and waiting upon customers, and had settled with his customers and taken notes to the plaintiff; that he sometimes took pay and handed over whatever was paid to the plaintiff; and that the plaintiff exhibited said assignment and schedule to the defendant, before the goods were removed.

After having given in evidence the writs of attachment, &c., on which said property was taken and sold as the property of Caleb B. Hall, the defendant read in evidence the deposition of Charles Hunter, who had been, by the defendant, discharged from all liability, and who testified, in substance, that he was formerly a member of the firm of Hunter, Kellogg & Co., and went to Clarendon in February, 1840, to secure a debt which Caleb B. Hall owed to that firm; that on the 16th of February, 1840, he called at the store of Caleb B. Hall, in Clarendon, and found him behind the counter, waiting upon his customers, and handing down and dealing out goods, and, to all appearances, having the sole care and charge of the store; that he applied to said Caleb B. for security, and was informed by him that he had, some time previous, made an assignment of his goods to his father, and that said Caleb B. declined making any satisfactory security; that he conversed with said Caleb

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B. several hours, during all which time said Caleb B. continued to have the charge of the store and to wait upon his customers, that he returned to the store again the next day, with a writ of attachment, and accompanied by the defendant, the sheriff; that Caleb B. was then absent, but returned, after some hours, and, still declining to give security for the debt, and the clerk, who was then in the store, leaving it, so that no one remained in it but Caleb B. Hall, the witness Hunter and the sheriff, Hunter gave the writ to the sheriff, and directed him to attach the goods upon it,—which was done; and it appeared that it was for this taking that the present action was brought.

The defendant also introduced testimony tending to prove, that, after said assignment and before said attachment, Caleb B. Hall continued in the store and assisted to make an inventory of the goods, and that, while making said inventory, the said Caleb B. and the clerk continued to sell goods to the customers, and that, after the inventory was completed, the said Caleb B. took the books to his own house and posted them, and made settlements with his customers, and, when a balance was found due from him, gave them a memorandum of the amount to carry to the store, where the amount was paid in goods; that, when the books were posted, they were carried back to the store, (after about one week;) and that from that time the said Caleb B. spent his time in said store, settling with his customers, taking notes, and taking pay for balances due, and paying in goods, where balances were found against him, and that he also paid in goods his outstanding due bills payable in goods; that he sold goods, waited upon his customers, and took goods from the store for his family's use, without weight or measure, made charges upon the books, and, in many cases, had the sole possession, charge and care of the store, selling goods, and taking pay, in the absence both of the plaintiff and the clerk.

After the evidence was closed, and before the cause was submitted to the jury, the counsel for the defendant requested the court, in writing, to charge the jury, as follows;—1st. That, to entitle the plaintiff to recover, he must have taken and kept *exclusive* possession of said property. 2d. That, if the jury find that said Caleb B. Hall was permitted to exercise, separately, or jointly with said Caleb

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Hall, possession of said goods, the goods were subject to attachment as the property of the said Caleb B. Hall. 3d. That, if the possession of said Caleb B. was by the permission, or request, of the plaintiff, it did not alter its character or effect as to the creditors of said Caleb B. 4th. That the exhibiting said assignment to Hunter and the fact that he was notified thereof before attachment, can have no effect. 5th. That if the jury find that said Caleb B., after the assignment and before the attachment, did post the books, settle with the customers, receive the pay, pay their balances, deal out goods, charge them on the plaintiff's books, wait on customers, pay out goods on his debts, and take goods for his family, it did constitute a possession, either in his own right, or jointly with the plaintiff; and that the plaintiff cannot recover, even though all these things were done at his request and procurement.

In answer to the first and second request, the court charged substantially as requested. As to the third request, the court charged the jury, that they should inquire whether John M. Hall the clerk, was the servant of the plaintiff, and also who was at the head of the business; and that, if a careful observer would be at a loss to determine this, it would be deemed a joint possession; and that this was a fact for the jury to find from all the facts proved in the case. In answer to the fourth request the court charged as requested. As to the fifth request the court charged the jury, that it was for them to find in whom was the possession, and whether it was a joint or exclusive possession; that the several facts there supposed did not constitute a possession in Caleb B. Hall, either in his own right, or jointly with the plaintiff, but were evidence of such possession, to be considered by the jury; and that, in determining this point, it would be proper for them to consider the fact that the plaintiff owned the store and land, that the sign had been taken down, and a new set of books procured, and whatever other outward change there was in the circumstances, and in the person who was in attendance upon the business of the store; and that, in determining these questions in relation to fraud in law, it made no difference where the clerk boarded, or by whom he was first informed of the change.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

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————— for defendant.

Ormsbee and Linsley, for plaintiff, cited *Hall v. Parsons*, 15 Vt. 358; *Allen v. Edgerton*, 3 Vt. 458; *Harding v. Jones*, 4 Vt. 469; *Wilson v. Hooper et al.*, 12 Vt. 656.

The opinion of the court was delivered by

BENNETT, J. This is the second time that this case has come before this court, substantially upon the same state of facts. In the same case, reported in the 15th volume of Vermont Reports, p. 358, the county court assumed, that, if the jury found the facts detailed in the charge, which they were about to give to the jury, they would constitute such a concurrent, or joint, possession in the Halls, as would render the assignment fraudulent in law, as against the creditors of Caleb B. Hall.

The majority of the supreme court thought, that, from all the facts detailed in that bill of exceptions, the plaintiff was entitled to a different charge. No doubt, that a *concurrent* possession in the vendor and vendee, after the sale of a chattel, does, under the established law in this state, render the sale, in the eye of the law, a *fraud per se*, as to the vendor's creditors; and what given state of facts will constitute a *concurrent* possession must also be a question of law; though it must always be a question for the jury to decide, what facts are established by the evidence. In the case before us no question can arise as to the plaintiff's having taken and maintained a possession of the goods, after the assignment; but the important question is, did Caleb B. Hall, at the same time, have a *concurrent* possession with him? The possession of the plaintiff was substantial, open and notorious. He owned the store, took down the sign of Caleb B. Hall, which was lettered with his name, and hired the clerk anew, and, as the case finds, gave directions to the clerk, informing him of the assignment, and took the *control* of the store, and opened a new set of books, and, as testified by John M. Hall, whose deposition is made a part of the case, the plaintiff was present personally in the store, most of the time after the assignment, attending to the business of the store, to the time of the attachment.

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In *Farnsworth v. Shepard*, 6 Vt. 531, the plaintiff had, in August, 1831, purchased a mare of one Barker, and had kept and used her as his own from that time until the next March, when she was attached as the property of Barker. Yet it appeared on trial, that Barker, in the fall of 1831, had rode the mare twice to Danville, and once to Greensborough, and that he had several times drove the mare in a wagon to meeting with some of the plaintiff's family, and a few other times was seen riding and driving the mare in the neighborhood, and, when the mare was attached, Barker and one Ellis were returning with her from Randolph in a sleigh. Notwithstanding these facts, it was held that the plaintiff had the general and permanent possession of the mare, and that such temporary lendings, or hirings, did not give such character to the possession of Barker, as to render the sale a fraud *per se*, for the want of a change in the possession. *Lyndon v. Belden et al.*, 14 Vt. 423, is to the same effect.

In *Allen v. Edgerton*, 3 Vt. 442, the question came directly before the court in regard to what should constitute such a *concurrent* possession, as would render the transfer *fraudulent per se*. The plaintiff had assumed a liability for one Seely, and Seely had, among other things, assigned to the plaintiff wool, cloth, yarn, &c., in an unfinished state in a factory, and *Seely was to assist and have a voice in the manufacture and sale of the articles*. The plaintiff was, from the avails, to pay, in the first place, the debts for which he was holden. The plaintiff, under the contract, came into possession of the goods, and had conducted the manufacturing of them for several weeks, when they were attached by a creditor of Seely. In the defence the defendant gave testimony tending to prove that Seely was advising in regard to the business, and that he continued to have a *joint* possession of the property with the plaintiff; and it was insisted, that, for this reason, the transfer was a *fraud per se*. But the court gave in charge to the jury, that, if the transfer was *bona fide*, to render it void as against creditors "it must appear that the possession and use of the property was of the same description, as that of a joint owner, in using, occupying and disposing of it." This charge, upon exceptions, was held to be correct, and is, in effect, the same rule that was applied in the case of *Farnsworth*

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v. *Shepherd*. The possession, which Barker, in that case, had of the mare, was not in fact that of a joint owner, and was not allowed to control the general possession, which had been in the plaintiff.

In the case now under consideration, the plaintiff's testimony, it is said, tended to prove that Caleb B. Hall took the books home to post at the request of the plaintiff, and then returned them, and that he had, also, at the request of the plaintiff, at times, assisted in handing down and selling goods and waiting upon customers, and had settled with his customers, and took notes to the plaintiff, and sometimes took pay, which he handed to the plaintiff. The case finds, that, on the part of the defendant, evidence was given tending to prove, that, after the assignment, Caleb B. Hall continued in the store, and assisted in making an inventory of the goods, and that, while making the inventory, Caleb B. and the clerk continued to sell goods to the customers; that, when the inventory was completed, Caleb B. Hall took the books to his house and posted them and made settlements, and, when balances were found against him, he gave to the persons with whom he settled memoranda to carry to the store, where the amount was paid in goods, and that, after about one week, the books were returned to the store, and from that time Caleb B. was in the store, settling with his customers, taking notes and pay for balances due, and, when the balances were against him, paying them in goods out of the store, and also his outstanding due bills payable in goods; and that he also sold goods, and waited upon the customers; and the case says that he took goods from the store, without weight, or measure, for his family's use, made charges on the books, and, in many instances, had the sole charge and care of the store, selling goods and taking pay, in the absence of the plaintiff and of the clerk.

In this case the testimony does not, on either side, show that Caleb B. Hall had any beneficial use, or possession, of the property, as a joint owner, inconsistent with the assignment. It was a matter quite immaterial where the clerk continued to board, as to the actual possession of the goods. The fact that Caleb B. Hall had the books at his own house, posting them, is no act of ownership over the goods then in the store, indicating to whom they belonged;

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neither was the settlement of the old accounts and giving memoranda of the balances due; and if the plaintiff chose to consent that they should be paid in goods, it would seem as if this should not have any effect upon the question of possession. It was according to the *trust*, that the plaintiff should first be paid, and then all the other creditors of Caleb B. Hall, in equal proportions. If the plaintiff chose to waive his *priority* of claim under the assignment, he had a right so to do. If it turned out, that all the creditors did not get their pay, whether the plaintiff, in accounting with them, should be allowed the whole sum paid in full of an individual creditor's debt is quite another question.

The fact, that Caleb B. Hall might sometimes take notes to the plaintiff, and also receive payment from balances that might be found due to the store, (which the case finds he paid to the plaintiff,) is consistent with the idea, that he was only the plaintiff's servant. So, if he paid any of the balances, found against him, or outstanding due bills, in goods, it was no perversion of the property to his individual use, to the injury of creditors; and the acts might well be performed by him in the character of a mere servant. The same may be said in regard to his having sometimes sold goods and waited on customers. The expression, in the bill of exceptions, that testimony was given tending to prove "that Caleb B. Hall took goods from the store without weight, or measure, for his family's use," is indeed quite too general. If he was made debtor for such things as he had, it would be the same, as if any one else had purchased them. But if, on the other hand, his family were having from the store, from day to day, such things as are ordinarily wanted in a family, without his being made accountable, it would be very important, in showing a joint beneficial possession of the goods in Caleb B. Hall. But if, on the contrary, Caleb B. Hall should, upon any one particular occasion, carry into his house a cup of coffee, or a bowl of sugar, "without weight, or measure," it could have but little effect in giving character to a transaction like this.

We think, when the question is upon a *joint* possession, the rule was well laid down in *Edgerton v. Allen*,—that it must appear to be of the same description, in the use, occupancy and disposition of it, as that of a joint owner. Any thing short of this would not

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seem to furnish evidence, that the vendor still continued the owner, so as to gain a credit by his continued possession. This rule was, in substance, adopted by the court below, with the qualification, that, if a careful observer would be at a loss to determine which of the two were at the head, having the chief control of the business, it must be deemed a joint possession. Under these instructions the jury have negated the fact of there being a joint possession; and the judgment of the county court is affirmed.



ARUNAH W. HYDE v. OLIVE BARNEY.

The heir of an intestate has, immediately on the death of the ancestor, a vested interest in his estate, which may be conveyed by deed.

If the heir be a *feme covert*, her husband has an interest in the real estate, as tenant by the curtesy, which may be conveyed, or which may be taken for his debts.

And the interest of the husband in such estate may be attached immediately upon the decease of the ancestor, before any distribution, or any action of the probate court, and may be levied on by execution.

In a return of a levy of an execution upon real estate, a reference, for a description of the land, to deeds upon record which contain a proper description, is sufficient.

A defect in a levy of execution upon the undivided interest of an heir, in the real estate of the ancestor, in not stating the amount of the interest of such heir in the estate, is, at most, a mere defect in form, which will be cured, after the lapse of two years, without action by either party, under the statute of 1837. [Rev. St., c. 42, §§ 43, 44.]

EMENDMENT for the recovery of certain premises in Castleton. Trial by the Court. The possession of the premises by the defendant, at the time of the service of the writ in this action, was conceded.

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It appeared that the defendant was the widow and administratrix of Thomas Barney, who died seized in fee of the premises in question; that Evaline Barney, now Evaline Towner, who was married to James S. Towner, and by whom she had issue born alive, was the daughter and one of the heirs of said Thomas Barney. The plaintiff claimed title by virtue of an attachment and levy of execution upon the interest of the said James S. Towner in the premises in question, made before any settlement of the estate of the said Thomas Barney, and before any decree of distribution of the same among the heirs of said Thomas.

The descriptive part of the return of said levy, upon the execution, was in these words; "I extended and levied this execution on 'the undivided share, or part, of the several pieces or parcels of 'land lying and being in Castleton aforesaid, belonging to the said 'James S. Towner as tenant by the curtesy, that is to say, all of the 'undivided part, or share, belonging to Evaline Towner, wife of 'the said James S. Towner, in the real estate in said Castleton, of 'which Thomas Barney, her father, late of said Castleton, died 'seized and possessed,—for a particular description of the said several pieces, or parcels, of land reference may be had to the several 'deeds thereof to the said Thomas Barney, on record in the town 'clerk's office in said Castleton,—the proper life estate of the said 'James S. Towner, as tenant by the curtesy, as aforesaid." The levy was made Aug. 5, 1833.

The defendant objected to the introduction of said attachment and levy, as being both irregular and void. The defendant also insisted that the interest of the husband in said premises, under the circumstances, was not liable to attachment and levy. The defendant also introduced a deed from Evaline Towner and her husband to the defendant of the said Evaline's interest in said estate, which bore date the 7th day of May, 1840.

The county court rendered judgment, upon these facts, in favor of the plaintiff; to which decision the defendant excepted.

I. T. Wright and Ormsbee & Edgerton for defendant.

The right of an heir to a distributive share in an estate is not ordinarily attachable. If it be the right of the wife, it is treated like

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other choses in action, and she takes it by survivorship. *Parks et al. v. Hadley*, 9 Vt. 320. *Short v. Sampson*, 10 Vt. 446.

The description in the levy is, we contend, wholly insufficient, and the levy is irregular and void. It is quite as loose as the levy upon "all the right, title and interest," &c. *Arms v. Burt et al.*, 1 Vt. 303.

At the time this levy was made it is apparent that there was no estate before the appraisers, which they could properly and understandingly appraise. They were called upon to appraise the contingency of a contingency.

B. F. Langdon for plaintiff.

1. The plaintiff insists that the husband has such an interest in the freehold estate of his wife, after issue born alive, that it may be attached, or levied on by execution, under our statute, on the death of the ancestor, and before distribution of the estate. *Slade's St.* 210, § 3. 9 Vt. 326, 336, 337. *Com. Dig., Tit. Baron & Feme, E. (3.)* *Griswold v. Penniman*, 2 Conn. 564, 567. 2 Kent 112, 113, 134. 4 Kent 27, 28. In the case of *Griswold v. Penniman*, Judge Swift says, "The right does not depend on the distribution, but originates by the statute at the time of the death of the intestate.

2. The levy on "all the undivided share, or part," was good, because the husband was seized of it, and it could not do away the right of division among the heirs. *Sl. St.* 212, § 7. 3 Vt. 394-9. 9 Ib. 326, 336, 337. *Swifts Dig.* 155.

3. The levy is good as to certainty. The statute requires the description to be by "metes and bounds, or with as much precision as the nature and situation thereof will admit." The officer has done all he could do; he has so described the land, that he can identify and give possession thereof to the creditor, as tenant in common with the other heirs, by metes and bounds, because the levy refers to known deeds and descriptions on the public records of the town in which the lands lay. *Sl. St.* 210, § 4, 212, § 7. 10 Vt. 103, 105. 11 Ib. 643, 649. 11 Mass. 517.

The opinion of the court was delivered by

WILLIAMS, CH. J. The questions which are involved in this case have been mostly decided, either in this or the neighboring

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states. A new investigation, or a re-examination, of the cases which have been decided, is not called for. The decisions in the New England States, on the subject of the levy of executions on real estate, and the rights and interests of heirs, are entitled to a respectful consideration, inasmuch as our institutions are similar to theirs, and our laws, particularly on these subjects, are in many instances nearly copied from theirs.

That the heir of an intestate has, immediately on the death of the ancestor, a vested interest in his estate, which may be conveyed by deed, is not questioned. If the heir be a *feme covert*, that her husband has an interest in the real estate, as tenant by the curtesy, which may be taken for his debts, was decided in the case of *Mattocks v. Stearns et ux.*, 9 Vt. 326. *Procter v. Newhall*, 17 Mass. 81, and recognized in *Griswold v. Penniman et al.*, 2 Conn. 564. That such estate may be attached immediately on the death of the ancestor, before any distribution, or any action of the probate court, and may be levied on by execution, was expressly decided in the before mentioned case of *Procter v. Newhall*, 17 Mass. 81. Indeed the latter case may be said to run *quatuor pedibus* and to be identical with the present case, so far as it respects the right of the creditor to attach, and the interest which he derives by the levy of an execution.

The objections which are made to this view of the subject are altogether imaginary. It neither prevents or retards the action of the probate court in making a division. The creditor is substituted in place of the husband of the heiress; and if no objection is made to the distribution, or division, either by the husband or the creditor, neither the rights of the husband or of the other heirs are affected. The life estate of the husband is to be appraised, and there is always some uncertainty in estimating the value of a life estate; but the advantage arising from this uncertainty is wholly with the debtor. He can redeem, if the appraisal is too low; if too high, the creditor runs the risk.

Objections are then taken to the levy, as irregular and void. One, that the levy is not made by metes and bounds, but by reference to other deeds. This objection was taken to a levy in the case of *Boylston v. Carver*, 11 Mass. 515, and it was held that in a

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return a reference to deeds upon record was a sufficient description of the lands levied on. Without the authority of that case, I might have entertained some doubts on this point.

Another objection is, that the officer has not stated the amount of the interest of the heir,—whether one seventh, or more. This, at most, is a mere matter of form. He states that he has levied on the undivided share belonging to the wife; and it is not to be presumed that this was not known to, and ascertained by, the appraisers and officer;—and moreover the debtor has the same advantage here, as before mentioned; if too little was taken and the appraisal too high, the debtor has the advantage, if too much, he could redeem.

But there is another and conclusive answer to all these objections. The estate of the judgment debtor was liable to be taken in execution and levied on. If there was a defect in the return, or any irregularity, or informality, or if the levy was not made according to the strict rules of law, so that the title derived from the levy should be deemed doubtful, or uncertain, that defect was cured by the act of 1837, entitled “An Act relating to the levy of executions,” as well as by the act of 1835 on the same subject; and the levy was made good and valid to convey the interest of the judgment debtor, inasmuch as neither party moved or petitioned the supreme court to vacate the levy within two years from and after the framing of the several acts aforesaid.

The deed from Towner and wife to the defendant, under which she claims title, was not executed until the 7th of May, 1840,—previous to which all the defects in the levy were cured by the lapse of time.

The judgment of the county court is therefore affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON.
FEBRUARY TERM, 1845.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

GAY R. SANFORD v. LUMAN NORTON.

[Same Case, 14 Vt. 228.]

The case of *Sanford v. Norton*, 14 Vt. 228, so far as it decides in reference to the liability of one, not party to a note, who indorses it in blank, commented upon and examined by WILLIAMS, Ch. J.

Where, at the time a note was indorsed, the maker of the note was engaged in business in this state, and lived in a house with his son and daughter, his daughter being his housekeeper, and, before the note became due, went into another state, leaving his son and daughter living in the same house, his son being his agent in the transaction of his business in this state, it was held that a demand of payment of the note, made, on the day it became due,—which was about nine months after the maker of the note left the state,—at the house previously occupied by him, and which was then

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occupied by the son and daughter, was sufficient to charge the indorser, it not appearing that the maker had ever abandoned the idea of returning to his said residence, although it did appear; that, at the time the demand was made, he had an actual residence in another state.

Assumpsit upon a promissory note in these words; "Bennington, Dec. 29, 1838; On the first day of April, one thousand eight hundred and forty, for value received I promise to pay Uriah Edgerton, or bearer, one thousand and fifty six dollars;" (Signed) "~~Uriah~~ ^{Cale} SAYLES;"—on the back of which note there had been in written, in blank, the names of the defendant and of Samuel C. Raymond. The declaration contained a count against the defendant as *indorser* of the notes, and also counts against him as maker of the same note, and the common counts. Plea, the general issue, and trial by the jury.

On a former trial of this case the blank over the names of the defendant and Raymond had been filled up, in court, by the plaintiff's attorney, with the following words;—"For value received we jointly and severally promise to pay the money within mentioned to the said Uriah Edgerton, or bearer."

The plaintiff introduced parol evidence tending to prove, that, sometime in February, 1839, the note was transferred by Edgerton, the payee, to the defendant, and became his property,—at which time the defendant's name was not upon it; that afterwards, and before the note became due, it was transferred, by indorsement of the defendant, to Samuel C. Raymond; and that subsequently, and before it became due, it was transferred by Raymond, for a valuable consideration, to the plaintiff. Also, that, on the first day of April, 1840, the note was placed in the hands of a notary public, who, on that day, made demand of payment of a daughter of Caleb Sayles, the maker, at a house in Bennington, she being the only person in the house, but that no payment was made; that the note was then protested for non-payment; that on the same day the said notary left a written notice of such demand and protest at the dwelling house of the defendant, in Bennington, he being absent from home, but which was received by him the same day; and that on the same day the notary deposited in the post office, in

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Bennington, a written notice of such protest, directed to said Sayles, Wrentham, Massachusetts.

The plaintiff also gave evidence tending to prove that the note declared upon was executed by said Sayles in Bennington, at the time it bore date, he then residing in Wrentham, Massachusetts, and was given for real estate, including a building for manufacturing cotton, in Bennington; that, in the spring of 1839, the said Sayles, with a son and daughter, came to Bennington, and brought some furniture, and took possession of the property so purchased, and commenced preparing said factory building for operation, under the firm of Caleb Sayles & Co.; that his daughter acted as house-keeper for him and his son, in the house where the demand of payment was made of her, as above mentioned; that said Caleb Sayles remained there until sometime in July following, when he returned to Wrentham, where he has ever since continued to reside; that the wife of Caleb Sayles had never removed to Bennington; and that his son was his agent, and a partner in the transaction of business at Bennington, and resided with his sister at the house where the demand was made, but was, on the day of the demand, absent from home.

The defendant's counsel requested the court to instruct the jury that the facts, attempted to be proved, as above detailed, were insufficient to entitle the plaintiff to recover. But the court instructed the jury, that the evidence, if believed, was sufficient to entitle the plaintiff to recover against the defendant, as indorser of the note; that, the note having been executed at Bennington, for property so purchased there, it was to be presumed the parties understood that there was to be the place of payment; that it was not necessary for the plaintiff to show that Sayles had moved his family to Bennington, and taken up his permanent residence there, but that it was sufficient for him to prove that business, in which he was concerned, was carried on there by his partner, as agent for carrying it on; and that a demand at the residence of his said partner, or agent, being the place where Sayles had resided, while he was in Bennington, and where his business had been, and was, at the time of giving the note, expected to be carried on, was a sufficient demand of pay-

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ment of the note, although the residence of said Sayles was then known to be at said Wrentham.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

Hall & Lyman for defendant.

1. It is contended that the county court erred, in deciding that the defendant, from the testimony, was liable as an indorser, while the contract, as it then rested between the parties, would make him liable, if liable at all, as the signer of a joint and several promissory note. This contract it is true was attached to a blank indorsement; but the case finds that it was put there by the plaintiff, or his counsel, on a former trial of this suit; and while the contract remained upon the note, no evidence should make him liable as a common indorser,—which is only a conditional undertaking. *Smith v. Frye*, 14 Maine, 457.

2. It is contended, that the note in question should have been first indorsed by Uriah Edgerton, the payee, to make the subsequent indorsements negotiable. *Sanford v. Norton*, 14 Vt. 228.

3. But if the court shall be of opinion that the defendant is accountable to the plaintiff as a common indorser, with the contract as it is attached to the note, we have a farther objection to the right of recovery.

We believe it to be a principle of law, settled beyond controversy, that the contract between an indorser and an indorsee is a conditional contract. It is upon condition that the note is duly presented, payment demanded and refused, and the earliest reasonable notice of its dishonor given to the indorser, that he becomes accountable for the debt. *Heylins v. Adamson*, 2 Burr. 676.

It is admitted, in this case, that the residence of the maker, when he executed the note, was at Wrentham, Mass., where he resided when the note fell due, and that such fact was known to the parties. The date of the note indicates when the contract was executed, but it is not evidence of the residence of the maker, nor does it fix the place of payment. *Fisher v. Evans*, 5 Binn. 541. *Barnwell et al. v. Mitchell*, 3 Conn. 101. *Freeman v. Boynton*, 7 Mass. 483.

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Duncan v. Mc Cullough, 4 S. & R. 48. *Spencer v. Bank of Sulna*, 3 Hill 520. Bayl. on Bills 200. *Gilpin v. Hard*, 3 Mc Cord, 394. *Anderson v. Drake*, 14 Johns. 114. *Lowery v. Scott*, 24 Wend. 358. The parties not having fixed the place of payment in the note, it was left subject to general rules; and payment should have been demanded of the maker in person, or at his residence, if either could be found with reasonable diligence. The court, in their instructions to the jury, say. "The note being executed at Bennington, for property so purchased there, it was to be presumed that the parties intended that there was to be the place of payment." This instruction was manifestly wrong, as none of the parties to the note were on trial; and any understanding between them, not made a part of the note, should not affect the rights of the indorser and indorsee, who are strangers to that part of the contract.

4. We deny that Caleb Sayles ever had any such place of business at Bennington, as would warrant a demand for payment of his individual paper at that place. In order to constitute such a place of business, it should be one that would require the personal attendance of the maker; and it is upon the presumption that the maker will be more likely, or as likely, to be found there, as at his residence, that the place of business is recognized as the proper place for demand of payment. Bayley on Bills 200. It must be a place of business in the occupation of the party, and not where he occasionally visits. *Bank of Columbia v. Lawrence*, 1 Peters 582. *Bank of the United States v. Cochran*, 2 Peters 121.

5. A demand upon the general agent of the maker in all his business is not good. Bayley on Bills 210.

6. We insist that the county court erred in directing that the location of the property, for which the note was given, was proper evidence to fix the place of payment, and most especially as between these parties, who were strangers to the original contract.

7. It forms no excuse for not presenting the note, that the maker resided in Massachusetts when the note fell due; for that was the same place at which he resided, when the note was executed. *Mc Gruder v. Bank of Washington*, 9 Wheat. 598.

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W. M. Robinson for plaintiff.

As a general rule, demand of the maker of the note, at his residence, is essential to charge the indorser;—but this is dispensed with in many cases. *State Bank v. Hurd*, 12 Mass. 172. Chit. on Bills 399, note. *Herring v. Sanger*, 3 Johns. Cas. 71. *Thompson v. Ketcham*, 4 Johns. 285. *Howe v. Bowes*, 16 East 112. *Whitwell et al. v. Johnson*, 17 Mass. 449. If the maker of the note has absconded, or gone out of the country, the want of a demand will be excused. Chit. on Bills 385, 404. *Ld. Raym.* 743. *Putnam et al. v. Sullivan et al.*, 4 Mass. 45. *Leffingwell v. White*, 1 Johns. Cas. 99. *Widgery v. Munroe*, 6 Mass. 449. Every question, as to the diligence of the holder in making demand sufficient to charge the indorser, is to be decided according to the facts of the particular case. 3 Kent 91, 96. *Boot v. Franklin*, 3 Johns. 209. 3 Conn. 497. 14 Johns. 114.

It is a presumption of law, that the maker resides at the place where the note is dated, and that he contemplates payment at that place. *Stewart v. Eden*, 2 Caine 121. *Hepburn v. Toledano*, 10 Martin's, (Louis.) Rep. 1 Johns. 296. 20 Johns. 172. 3 Kent 96. Chit. on Bills 307.

If the maker remove from the State, he need not be pursued by the holder in the State to which he has removed. *Anderson v. Drake*, 14 Johns. 114. *Cromwell v. Hynson*, 2 Esp. R. 511. *McGruder v. Bank of Washington*, 9 Wheat. 598. 2 Taunt. 206. *Gillespie v. McHannahan*, 4 McCord 503. *Central Bank v. Allen*, 16 Maine 41. 1 Cowen's Treatise 195, 196. Chit. on Bills 401, note (2.) Ib. 14, note. Bayley on Bills 198. 3 Kent. 96. 2 Phil. Ev. 24, note 87. Anth. N. P. 1, notes.

A demand at the house, or place of business, of the maker, though shut up, is sufficient;—or of his wife. 4 B. & Adol. 127. 8 Mass. 260. 1 Pjck. 413. 6 Mass. 389.

We insist that the court were right in their instructions, and that the jury were right in their finding the facts, as it appears they did find them. When Norton received the note of Edgerton, Sayles was in Bennington; when Norton transferred the note to Raymond, there is nothing in the case which shows that he was not still in Bennington. All the parties to the note, except Sayles, re-

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sided at Bennington; Sayles was at Bennington while the note was transferred twice, at least. The note was dated at Bennington; it was given in part payment of a large amount of factory property, which was to be carried on in Bennington by Sayles. Now where did the parties expect that Sayles would do the business appertaining to the factory, and pay his notes,—at Bennington, or in the State of Massachusetts?

In whatever place a person has a domicile, or place of business, where he keeps his papers, a demand on him there, as maker of a note, or notice to him as indorser, is sufficient, although he have no fixed residence there, or legal settlement, or right to vote. *Peirce et al v. Pendar*, 5 Metc. 359.

A person, indorsing his name in blank on the back of a note, is supposed to enter into some contract respecting the note. If the note is payable to bearer, or to order, the indorser is liable as indorser, and in no other form. *Dean v. Hall*, 17 Wend. 214. *Hall v. Newcomb*, 3 Hill 233. If indorsed payable to A. B. or order, A. B. not having indorsed it to give it currency, the indorser in blank will be liable as joint maker, or guarantor, according to the contract at the time of indorsing. The following cases were all cases of notes payable to the payee, or order, viz. *Nash v. Skinner*, 12 Vt. 219; *Sumner v. Gay*, 4 Pick. 311; *Herrick v. Carman*, 12 Johns. 159; *Tillman v. Wheeler*, 17 Ib. 326; *Palmer v. Grant*, 4 Conn. 389; *Beckwith v. Angell*, 6 Ib. 315; *Wylie v. Lewis*, 7 Ib. 301; *Ulen v. Kittredge*, 7 Mass. 233; *White v. Howland*, 9 Ib. 314; *Moies v. Bird*, 11 Ib. 436. It is believed that no case can be found, where the indorser in blank of a note, payable to A. B. or bearer, has been held as joint maker, or guarantor. The payee of such a note is a mere cypher; every person indorsing such a note makes a new party. *Dean v. Hall*, 17 Wend. 214. Bayl. on Bills 26. Chit. on Bills 181. 4 Mass. 458, 462. 3 Burr. 1526. 13 Vt. 248.

The opinion of the court was delivered by

WILLIAMS, CH. J. This case was before this court in February, 1842. I was not present at that time. The judgment, which was then reversed, had been made at the county court, when I presided,

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and, as the views which I then entertained have some influence on me in the decision which the court have at this time made, it may be proper to state them, without any disposition to go abreast of the judgment of this court, reversing the former decision of the county court.

The note was originally made by Caleb Sayles, payable to Uriah Edgerton, or bearer. Edgerton's name was not on the note, but the names of Norton, the defendant, and Raymond. Under these circumstances I considered that the plaintiff might recover against the defendant, as maker, and that, as no evidence was given to show that there was any fraud, or force, in obtaining the note from the maker, or holder, it appeared to me that the plaintiff was not called on to prove that he gave a consideration for the note, or that it was indorsed to him while current; and, until this was done, the defendant was not at liberty to contest with the plaintiff his liability on the note, or to change the *prima facie* character of the transaction by any evidence of what transpired between him and Raymond, the knowledge of which was not carried home to the plaintiff. Both of these positions were established by this court in the case of *Flint v. Day*, 9 Vt. 345, and in *Nash v. Skinner*, 12 Vt. 219. In the former case declarations, made by Day at the time he signed the note on the back, were not allowed to change the character he assumed, as it respected a person to, whom they were not known. In the latter, all the cases, both in this State, in Massachusetts, and in New York, were elaborately considered by the counsel, and the judge, who delivered the opinion of the court, lays it down as settled law in this State, established by decisions, "that when a person, not a party to a note, signs his name upon the back, without any words to express the nature of his undertaking, he is considered as a joint promisor with the other signers;" and the court further decided that any conversation, to the effect that the defendant was to stand as an indorser, and not as a maker, could not prejudice the payee in that note, not carried home to his knowledge; and surely, if they could not prejudice the payee of the note, they ought not to affect an indorsee. The case of *Strong v. Riker*, 16 Vt. 554, is to the same effect.

That this principle, of considering that a person, not a party, who

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indorses a note, is to be considered as maker, is not confined to notes not negotiable, we find in the cases before mentioned, both of which were on negotiable notes, and also in the cases of *Ulen v. Kittredge*, 7 Mass. 233; *Moore v. Bird*, 11 Ib. 436; *Nelson v. Du-bois*, 13 Johns. 175; and in the case of *Dean v. Hull*, 17 Wend. 214, it was considered, that, when a person is privy to the consideration, and indorses a note, though negotiable, if not negotiated, he may be charged directly as maker. I think, therefore, that, in this State, it has been established, and is now, unless it is considered as changed by the determination made in this case when formerly before the court, that the defendant was liable as joint principal, and, though it may be admitted, that, as between the parties to the contract, this relation may be varied by parol proof, yet as to others, having no knowledge, the apparent engagement and obligation must be considered as the real one.

The parol proof, which was offered on the former trial, of the receipt of Raymond, and the other facts, it appears to me would not have been admissible, unless upon the principle that the plaintiff, on its admission, would have been obliged to show that he paid a consideration, and took the note while current. To require this would entirely contravene the policy of the legislature, when they repealed the former law, subjecting negotiable notes to certain infirmities, and adopted the common law, or the law merchant, in relation to commercial and negotiable paper. Whatever I might have thought of the policy of this action of the legislature, I feel bound to give effect to their enactments, and, whatever I find the law to be, so to declare it; and if I find a decision, which I might consider as more congenial to my views of what the law ought to be, yet, if it is not the law, I do not feel at liberty to adopt it,—which would be, in effect, to make, and not declare, the law.

The case of *Heath v. Sanson*, 2 B. & Adol. 291, decided that when, from the defect of consideration, the original payees cannot recover on a note, or bill, the indorsee, to maintain the action against the maker, as acceptor, must prove a consideration given by himself, or by a prior indorsee, though he may have had no notice that such proof would be called for. This decision was made by a majority of the court, Parke, J., dissenting. This decision stands

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solitary and alone, and we learn in a subsequent case, by the remarks of Patterson, J., who was one of the judges who concurred in the decision, that it lead to a consideration of the subject by the court, the result of which has been a decision adverse to the majority of the judges in that case, and in conformity to the views of Parke, J., who dissented. In a note to Chitty on Bills, 56, the opinion of Parke, J., is considered as conformable to the law; and it is stated, that, in the London Law Magazine, the decision in that case, is considered as unfounded in principle and opposed to authority. The cases of *French v. Archer*, 2 D. & R. 130; *Stern v. Yglesias*, Ib. 252; *Low v. Clifford*, 5 M. & Scott 95; *Brand v. Roberts*, 1 Bingh. N. S. 465; *Whittaker v. Edmunds*, 1 M. & Rob. 365, and the opinion of the chancellor of New York, in *Morton v. Rogers*, 14 Wend. 582, may all be considered as disregarding and overruling the case of *Heath v. Sansom*.

16/ The case of *Sturtevant v. Lord*, 43 E. C. L., 61, and the case of *Arbouin v. Anderson*, 41 E. C. L. 642, seem to settle the doctrine, as now prevailing in England, that the owner of a bill, or note, is entitled to recover upon it, if he come by it honestly, that that fact is implied, *prima facie*, by possession, that, to resist the inference so raised, fraud, felony, or some such matter, must be proved, and that it is not sufficient to show a want of consideration. The case of *Charles v. Marsden*, 1 Taunt. 224, is recognized and re-established. The same position, which now prevails in England, is recognized by the Supreme Court of the United States in *Swift v. Tyson*, 1 Pet. 1. I feel warranted, therefore, in saying, that, if the doctrine of the case of *Heath v. Sansom* is established by the decision to which I have adverted, I regret it, because I think it is not recognized as law any where else. I cannot see, that, in the case of *Bassett v. Dodgin*, 25 E. C. L. 21, any confirmation of the case of *Heath v. Sansom* is given, or that it was spoken of with approbation, or disapprobation; but, so far as the decision was had in this latter case, it was rather in opposition to, than in approbation of, that case.

On the trial of this case at the last county court, the testimony, which was rejected at the former trial, was admitted; and I am to suppose that it established the fact, that the defendant was not a

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maker, or guarantor, but an indorser. For I cannot suppose, that, when a man, not a party, indorses a note, he is to be considered *prima facie* a joint maker, according to our previous decisions, and *prima facie* an indorser, as now established. Without in any way impugning the decision made in this case, when it was formerly reported, and taking it for granted that the testimony, which had been offered, should have been admitted, and on the facts now in the case, I think the plaintiff entitled to recover on the whole case, as presented. To this plaintiff the defendant was apparently a joint promissor. The plaintiff received the note for a valuable consideration, it was indorsed and delivered to him before it was due, and as to him it was not open to the inquiry when the defendant's name was on the note; he had no notice of the transactions between the defendant and Raymond, and there is no defence to the note, and the plaintiff has received the note while current, and paid a consideration therefor.

This was not the ground on which the case was put at the last trial in the county court, but the defendant was treated as an indorser; and on this ground we are of opinion the defendant was rightly charged; and although I do not feel very clear and decided in this view, I yet acquiesce and agree with my brethren, that, if the defendant is to be considered as an indorser, on the facts which appeared before the court, he was liable as such. In this aspect of the case, Sayles was the maker of the note, and it was incumbent on the plaintiff to present the note to him, when it became payable, and, on his neglect to pay, to give due notice to the defendant. The question is, whether the note was so presented for payment as to charge the indorser; for if it was, there is no doubt but that the defendant was duly notified.

The charge of the court was, that the evidence, if believed, was sufficient to entitle the plaintiff to recover; and in this opinion we coincide with the court below, without deciding whether all the views expressed in the charge were correct, or not. At the time the note was executed, Sayles, the maker, resided in Wrentham, Massachusetts; but in the spring of the year, when this note was indorsed to the plaintiff, or about that time, Sayles had commenced a residence in Bennington; he began to keep house with his son

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and daughter, and his daughter was his housekeeper, and he remained there personally until the July following; and the daughter and son continued to keep house there, the son acting as the agent of Sayles, at the time when the note fell due, and when the demand was made. It is not found that this residence was ever abandoned by Sayles, the maker, or that he gave up the idea of returning to his house here, and attending personally to his concerns; but the contrary is to be inferred from the facts in the case. It was therefore a question, not susceptible of being made perfectly clear, where was, in point of fact, the actual residence of Sayles. While he resided in Bennington, keeping house, that was his residence, notwithstanding the other part of his family had not removed there; and although a personal demand on the maker, any where, would have been sufficient to charge the indorser, we are of opinion that the demand in this case was equally sufficient, within the spirit of the cases read at the bar by the plaintiff's counsel. The case from the 10th Martin's Rep. is very much in point.

The judgment of the county court is therefore affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDHAM.
FEBRUARY TERM, 1845.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, }
HON. MILO L. BENNETT, } **ASSISTANT JUDGES.**
HON. WILLIAM HEBARD, }

JOSEPH STEEN AND LOVELL FARR v. ROGER WARDSWORTH.

If it do not appear from the rule of reference of a case, that the referee was required to decide the case upon strictly legal ground, nor from his report, that he intended so to decide it, his report will not be set aside, though he may have mistaken the law in his decision.

In an action for use and occupation, the defendant cannot dispute the title of his landlord, nor that of the assignee of his landlord; and he is bound to pay rent, while he occupies, to the plaintiff, though the assignment from the landlord, under which the plaintiff claims, were fraudulent and void as to the creditors of the landlord.

INDEBITATUS ASSUMPSIT for use and occupation. The action was referred, under a rule from the county court, and the referee reported, as follows.

Steen et al. v. Wardsworth.

In January, 1843, one Thompson, being in failing circumstances, made an assignment of his property, including the premises in question, to the plaintiffs, for the benefit of his creditors. The premises in question were conveyed by a deed separate from the deed of assignment, but which referred to the deed of assignment for its terms, and which was duly acknowledged and recorded. The defendant was in possession of the premises, under Thompson, at the time of the assignment, and was informed by the plaintiffs that the rent would be at the rate of \$75.00 *per annum*; and the defendant paid to the plaintiffs the first quarter's rent, at that rate, and this action was brought for the rent for the two succeeding quarters.

The referee decided that the plaintiffs were entitled to recover the rent claimed, and interest. To this decision the defendant filed exceptions in the county court, which were overruled, and judgment was rendered for the plaintiffs upon the report. Exceptions by defendant.

D. Kellogg, for defendant, contended that the assignment from Thompson to the plaintiffs was inoperative and void, and that therefore the plaintiffs' title failed, and they were not entitled to recover in this action.

Bradley & Walker, for plaintiffs, contended that the tenant cannot dispute the title of the landlord, nor of the assignee of the landlord, and cited, to this point, *Parker et al. v. Manning*, 7 T. R. 537; *Cooke v. Loxley*, 5 Ib. 4; B. N. P. 139; *Balls v. Westwood*, 2 Campb. 11; *Doe v. Smythe*, 4 M. & S. 347; *Rennie v. Robinson*, 1 Bing. 147; 2 Cowen's Phil. Ev. 201, 202; 4 Ib. 61-63; *Tuttle v. Reynolds*, 1 Vt. 80; *Greeno v. Munson*, 9 Vt. 37.

The opinion of the court was delivered by

BENNETT, J. It does not appear that the referee was required, by the rule, to decide the case upon strictly legal ground, nor, from his report, that he so intended to decide it. In such case the report will not be set aside, though the referee may have mistaken the law. The tribunal for the trial of the cause is created by the agreement of the parties; and they must be satisfied with the decision of a

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court of their own creating, unless it appears that such court intended to decide according to law.

But we see no ground to question the correctness of the decision of the referee. In an action for use and occupation, the defendant cannot dispute the title of his landlord, nor that of the assignee of the landlord; and, while he occupied, he is bound to pay the rent. Though the assignment by Thompson were fraudulent and void as to creditors, still this would not alter the principle. The defendant has paid a part of the rent, which was to be at the rate of seventy five dollars a year, and he can be made accountable, for the balance now due, only to the plaintiffs.

The judgment of the county court is affirmed.



CALVIN WASHBURN, CHARLES A. WHITNEY AND JOHN M. WASHBURN v. JOB RAMSDELL,

Neither the declarations of the payee of a note, as to payments made to him by the maker, nor a receipt signed by him, acknowledging such payment, made at a time when he was not holder of the note, are competent evidence for the maker of the note, in an action brought against him by an indorsee, when the payee is alive and can be produced as a witness.

It seems, that, in the absence of all proof as to the time when a note was indorsed, the court will presume that it was indorsed while current.

ASSUMPSIT upon a promissory note for \$118,88, dated February 20, 1842, and made payable to Erastus Ramsdell, or order, on demand with interest, and by the said Erastus indorsed to the plaintiffs, who brought this action as indorsees, alleging that the indorsement was made on the day of the date of the note. Plea, the general issue, and trial by the court.

On trial, after the plaintiffs had given in evidence the note, and proved its execution and indorsement, the defendant offered evidence tending to prove, that, in October, or November, 1842, Erastus Ramsdell, in a conversation between him and the defendant, ad-

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mitted that the defendant had, before that time, made him a payment of about eighty dollars on the note in suit, and also offered in evidence a receipt, signed by the said Erastus, dated October 1, 1842, and acknowledging the receipt of \$80.50, in part payment of the note. It did not appear that the note at the time of the said conversation, or of the giving of the receipt, was in the possession of the said Erastus.

To the admission of this testimony the plaintiffs objected, and the court rejected the same, and rendered judgment for the plaintiffs for the whole amount of the note and interest, without requiring or having before them any other evidence, as to the time when the note was indorsed, than the note itself, which was indorsed in blank. Exceptions by defendant.

R. W. Smith for defendant.

1. The evidence and receipt, offered by the defendant and rejected by the court, showed a payment made, to be applied on the note in suit, and that this payment was made to the original payee of the note.
2. The payment made by the defendant ought to have been deducted from the note, unless the plaintiffs, in some way, proved that the note was indorsed to them while current.
3. After the evidence and receipt offered by the defendant, the burden of proof was cast upon the plaintiffs, to show at what time the note was indorsed to them.

R. Tyler for plaintiffs.

The evidence rejected was not admissible.

I. Because it was mere hearsay. Erastus Ramsdell, the payee, whose declarations were offered, was a competent witness for the defendant and ought to have been called. *Chitty on Bills* 650 & note. *Ib.* 651. *Chipsam v. O'Brien*, 1 Esp. R. 10. *Duckham v. Wallis*, 5 Esp. R. 251. *Hedger v. Horton*, 3 Car. & Payne 179. *Ross v. Knight*, 4 N. H. Rep. 236. *Baker v. Briggs*, 8 Pick. 127. *Whittaker v. Brown*, 8 Wend. 490. *Bristol v. Dunn et al.*, 12 Wend. 142. *Hurd v. West*, 7 Cow. 752. *Warner et al. v. McGary*, 4 Vt. 507. The cases that seem contradictory will be found

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to be where admissions and declarations have been received as part of the *res gestæ*, showing fraud, or some vice in the *original making* of the note; as that it was on a usurious, or gaming consideration, &c. Chitty on Bills 649—50 and cases there cited.

II. The declarations of Erastus Ramsdell, the payee, if admissible at all, are only so after the title of the plaintiff is impeached by *proof by the defendant* that the plaintiff took the note when overdue, or under suspicious circumstances; for—

1. The indorser of a note, transferred before it is due, takes it on its own intrinsic credit, and is not bound to enquire into any circumstances existing between the assignor and any of the previous parties to the note. Chitty on Bills 241, 650. *Hinsdill v. Safford et al.*, 11 Vt. 313.

2. Notes payable on demand *with interest* are not to be considered overdue immediately. Chitty on Bills 246. 13 Vt. 485.

3. The presumption of law is, that the indorsement of a note is contemporaneous with its making, or at any rate, before it is due; and the burden of proof is on the defendant to show the time of the transfer, in order to let in evidence of payment. Chitty on Bills 248, 650,—Editors App. 830. *Beauchamp v. Parry*, 20 E. C. L. 351. *Webster v. Lee*, 5 Mass. 334. *Pinkerton v. Bailey*, 8 Wend. 600. *Potter v. Bartlett*, 6 Vt. 248. *Britton v. Bishop*, 11 Vt. 70. *Harrison v. Edwards*, 12 Vt. 648.

The opinion of the court was delivered by

WILLIAMS, CH. J. The proposition, that, when a person, who is a competent witness, is alive and can be produced as a witness, his declarations are not admissible in evidence, is clear and plain, and has been too often decided, to admit of a doubt at this time; and this is decisive of the case before us. The declarations of Erastus Ramsdell and his receipt,—which was but an admission,—could not be received in evidence, when he was alive, and could be produced.

The receipt, or declaration, of a payee of a note has never been held as admissible in evidence, in a suit to which he was not a party, when, at the time he made them, he was not holder of the note. It was not proved, in this case, that Erastus Ramsdell was holder of the note, at the time the receipt was executed, or at the time the

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conversation between him and Job Ramsdell was held ; nor was it proved that the note was not indorsed on the day it purported to have been indorsed.

The judgment of the county court is therefore affirmed.



CALEB NEWCOMB AND ABIAH BROWN v. GEORGE H. PECK AND
CHESTER W. POMROY.

A judgment rendered against a defendant, omitting his christian name, cannot be considered as void ; but an action may be maintained against him on such judgment, averring his identity.

The plea of *nil debet*, to an action of debt upon a judgment rendered by a court of record in another state, is bad upon general demurrer.

No plea is, in such action, admissible, which contradicts the record ;—but the defendant's only remedy is to apply to the court, where the judgment was rendered, to vacate the judgment.

Therefore, where the record set forth that the defendant appeared in the original suit, in which the judgment was rendered, it was held that he was estopped by the record, in an action founded upon it in this state, from pleading that he did not appear in that suit, or that an appearance, which was in fact entered for him, was unauthorised by him and without his knowledge.

And, the record having been set forth by the defendant upon *oyer*, the plaintiff was allowed to take advantage of this estoppel upon general demurrer to the defendant's pleas.

In *Pierson v. Mudget*, Addison Co., 1831, it was determined that a judgment rendered in another state, against a citizen of this state, who was not within the jurisdiction of the court rendering the judgment, and who had no notice of the suit, and did not appear, could not be enforced in this state by an action of debt upon the judgment. WILLIAMS, CH. J.

DEBT upon a judgment recovered in the court of common pleas for the county of Worcester, in the State of Massachusetts. The

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declaration alleged that the judgment was recovered against the defendants by the name of George H. Peck and ——— Pomroy, describing them as partners, &c. The defendants pleaded,—1st, *Nul tiel record*,—2d, *Nil debet*,—3d, That, at the time the judgment declared on was recovered against them, they were inhabitants of the State of Vermont, and had no notice of the pendency of that action, and never appeared therein, and never authorized any one to appear for them,—4th, They craved *oyer* of the record in said action, and set forth the same, and pleaded, that the said action was commenced against them at the September Term of the court of common pleas for said county of Worcester, 1837, without giving either of them notice thereof,—that for want of such notice the action was continued to the December Term of said court, 1837, at which term one Brigham, without authority from them, or either of them, entered an appearance for them,—and that thereupon the clerk made up his record that they then appeared, although, as they alleged, they did not appear, and had no knowledge of the pendency of the action,—and 5th, That the said court of common pleas, at the time of the rendition of the said judgment, had no jurisdiction over the persons of these defendants.

The record of the judgment, as set forth upon *oyer*, described the defendants in that action as "George H. Peck and ——— Pomroy, of Brattleboro in the county of Windham and State of Vermont, co-partners jointly negotiating under the style and firm of Peck & Pomroy," and set forth, that, at the December Term of said court, 1837, at which term said action was pending in said court, "the defendants appeared," and then said action was continued to the next term of said court, at which term judgment was rendered against the defendants by default.

The plaintiffs traversed the defendants' plea of *nul tiel record* and demurred to the remaining pleas.

The county court found the issue on the first plea in favor of the plaintiffs, and adjudged the four remaining pleas insufficient, and rendered judgment in favor of the plaintiffs. Exceptions by defendants.

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Keyes and Tyler for defendants.

1. The copy of record produced was not admissible, because it shows no judgment against *Chester W. Pomroy*. This is a defect in the record itself, such that no action can be sustained upon it, and may be taken advantage of under *nul tiel record*. Com. Dig., Record C, p. 394. Ib. Pleader 2. W 13, p. 245. 1 Chit. Pl. 286.

2. The declaration is bad on demurrer, for want of a distinct and issuable averment of the identity of *Chester W. Pomroy* with the person against whom judgment was rendered by the name of ——— Pomroy. 2 Chit. Pl. 483.

3. The 4th plea sets forth the record on oyer, and avers facts showing a want of jurisdiction in the court,—contradicting the record in so far as it states that the “defendants appeared.” In actions on judgments of sister states want of jurisdiction can always be shown, notwithstanding the record states an appearance by attorney, or generally. *Bissel v. Briggs*, 9 Mass. 463. *Hall v. Williams et al.*, 6 Pick. 233. 3 Cow. Phil. 800—908, 909. *Al-drich v. Kinney*, 4 Conn. 380, cited in Day’s Dig. 238. *Smith v. Rhoades*, 1 Day 168, [Day’s Dig. 238.] *Denison v. Hyde*, 6 Conn. 508, [Day’s Dig. 200.] *Starbuck v. Murray*, 5 Wend. 148. *Holbrook v. Murray*, 5 Wend. 161. *Shumway v. Stillman*, 6 Wend. 447. *S. C.*, 4 Cow. 292. *Bradshaw v. Heath*, 13 Wend. 408. *Thurber v. Blackbourne*, 1 N. H. Rep. 242. *Starkweather v. Loomis*, 2 Vt. 573. *Fullerton v. Horton*, 11 Vt. 425. The cases that seem to contradict this principle will be found to be generally reconcilable with it; for in them the record states, or it appears by admissions, or otherwise, that the defendants did something more than merely *appear*;—they actually pleaded to the merits, or did something in *defence* of the action.

4. However the court decide on the fourth plea, judgment must go for the defendants on the third plea; for that plea clearly avers the want of jurisdiction in the court, and the demurrer admits the fact. If the plaintiffs relied on the record, they should have replied it by way of estoppel. All the cases agree in this.

5. Want of jurisdiction may be shown under the plea of *nil debet*. *Bissel v. Briggs*, 9 Mass. 463. *Hall v. Williams*, 6 Pick. 233.

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Tharber v. Blackbourne, 1 N. H. Rep. 242. *Hozie v. Wright*, 2 Vt. 263. *McRae v. Mattoon*, 13 Pick. 53.

6. The 5th plea is good, on the general principle that *facts*, not the *evidence of facts*, are to be stated in pleading. 1 Chit. Pl. 572.

Bradley and Walker for plaintiffs.

1. As to the plea of *nil tiel record*;—the record is precisely as described in the declaration, and the issue is proved. The omission of the given name of one of the parties to the original writ could only have been taken advantage of by a plea in abatement. *Mann v. Carley*, 4 Cow. 198. *Waterbury v. Mather*, 16 Wend. 611, 613. Kinne's Law Comp., Misnomer, p. 18. *Stafford v. Bolton*, 1 B. & P. 40. *Meredith v. Hodges*, 5 B. & P. 453. 1 Chit. Pl. 440. If a party appear by the name in which he is sued, he is estopped from afterwards denying it. 1 Chit. Pl. 454. *Meredith v. Hodges*, 5 B. & P. 453. In this case the defendants *did appear*, as the record shows.

As to the 2d plea,—*nil debet*;—it has been repeatedly decided, by the highest authority, that *nil debet* is not a good plea to a declaration upon a judgment from another state. This is, *here*, no longer an open question. *Mills v. Duryee*, 7 Cranch 481. *Hampton v. McConnell*, 3 Wheat. 234. *Boston I. R. Factory v. Hoyt*, 14 Vt. 92.

To the 3d, 4th and 5th pleas we demur, because we say that the defendants are estopped from setting up the matter contained therein *by the record*, which shows that the defendants appeared; which record is conclusive upon them in this action, and which they cannot gainsay. We demur to these pleas, rather than reply the estoppel, because, when the matter which operates as an estoppel is spread upon the record, or the anterior pleadings, the party relying upon it may, and should, demur. 1 Chit. Pl. 575, 603. 3 Ib. 1143. Com. Dig., Estoppel A i. 1 Saund. R. 326, n. 4. Str. 617. *Ld. Raym.* 1550.

It has been repeatedly decided by the highest judicial tribunal in the union, that, by the constitution of the United States and the Acts of Congress, the record of a court of another state, properly authenticated, is entitled to the same credit, and its judgment has the same

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validity and effect, in every other state, that it has in the state where it was rendered. *Mills v. Duryee*, 7 Cranch. 481. *Hampton v. McConnell*, 3 Wheat. 234. *Mayhew v. Thatcher*, 6 Wheat. 129. 2 Dallas 303. Story's Pl. 296. These decisions have been followed in our own state. *Hozie v. Wright*, 2 Vt. 263. *St. Albans v. Bush*, 4 Vt. 58. *Boston I. R. Factory v. Hoyt*, 14 Vt. 92. Therefore, whatever effect and virtue this judgment is entitled to in Massachusetts, it is entitled to here. In Massachusetts a judgment is *conclusive* evidence of the existence and justice of the debt, and cannot be impeached, or avoided, by a party to it, either collaterally, or on account of error and fraud; but it is valid, until regularly reversed, or set aside, unless it appears, *from the record itself*, that the court have no jurisdiction. *Hall v. Williams*, 6 Pick. 232, 239, 244. *Cook v. Darling*, 18 Pick. 393. 1 Phil. Ev. 317. *Boston I. R. Factory v. Hoyt*, 14 Vt. 92.

Before the decisions in the cases of *Mills v. Duryee* and *Hampton v. McConnell* several of the state courts had treated judgments of other states as foreign judgments, *except merely as to the mode of proof*. *Bartlet v. Knight*, 1 Mass. 410. *Hitchcock v. Fitch et al.*, 1 Caine 480. *Kilborn v. Woodworth*, 5 Johns. 37. *Robinson v. Ex'r of Ward*, 8 Johns. 86. *Pawling v. Bird's Ex'rs*, 13 Johns. 205. In this state the doctrine was never adopted. *St. Albans v. Bush*, 4 Vt. 58. The courts, that have adopted this doctrine, have manifested great reluctance in bowing to those decisions of the United States' Supreme Court, and, especially in New York, have received them with great qualification,—insisting that the want of jurisdiction, of the court rendering the judgment, over the cause, or person, might be shown; and in one case, and *only one*, it has been decided that this might be shown *against the record*. *Starbuck v. Murray*, 5 Wend. 148. In most of the cases, where it has been decided that this want of jurisdiction might be shown, it has appeared from the record itself, or else it might be shown *without directly contradicting the record*. *Thurber v. Blackbourne*, 1 N. H. Rep. 246. *Borden v. Fitch*, 15 Johns. 121. *Aldrich v. Kinney*, 4 Conn. 380. Now it may not be impeaching the "faith and credit," to which such judgments are entitled, to show want of jurisdiction, when the record does not expressly set it up,—as in *Borden v. Fitch*,—or

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where it expressly appears that there was no jurisdiction over the person,—as in *Thurber v. Blackbourne* and *Hall v. Williams*. But to allow this want of jurisdiction to be proved *against an express averment of the record* would plainly be denying to that record that “full faith and credit” guaranteed to it by the constitution and the laws, which, in the language of Ch. J. Parsons, “provide that it cannot be contradicted, or the truth of it denied.”

In the case of *Aldrich v. Kinney*, 4 Conn. 480, the record states that *the defendant appeared by attorney*, and the court allowed the defendant to prove that the appearance was unauthorized. But in this state it has been expressly decided, that, in such a case, the authority of the attorney cannot be questioned, and that the appearance by attorney is conclusive upon the party. *Coit et al. v. Sheldon*, 1 Tyler 304. *Hoxie v. Wright*, 2 Vt. 263. *St. Albans v. Bush*, 4 Vt. 58. The same point was decided in the same way in *Field v. Gibbs*, 1 Peters C. C. Rep. 155. And if the authority of the attorney may not be enquired into, when the record states an appearance by attorney, the appearance of the party may not be enquired into, when the record states that appearance in person.

We say, then, that, when the want of jurisdiction over cause, or person, *does not appear from the record*, or may not be shown without contradicting the record, the record of judgment of one state is, when that judgment is sued in another state, *an absolute and indisputable verity*, and the only question is as to its existence.

The opinion of the court was delivered by

WILLIAMS, CH. J. In this case, on the plea of *nul tiel record*, an objection is made to a recovery by the plaintiff, because, in the record of the judgment, the christian name of Pomroy is omitted. It is to be observed that the record is precisely as stated in the declaration. The judgment rendered in the court in Massachusetts cannot be considered as void, on account of that omission. When a man makes a contract in one name, not his true one, the contract may be declared on in a suit against him in his true name, averring the identity; and so, also, when a judgment is rendered against a man in one name, he may be sued by his right name, with a similar averment.

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With respect to the other pleas, the court are not disposed to make an elaborate investigation of the various decisions, which have been made on the subject of foreign judgments, or of judgments rendered in the different states of the Union. It is sufficient for us to say, that all the questions, which arise in this case, have been decided in the courts of this state, and are reported as authorities. We are not inclined to take the lead in setting forth any new views upon this subject. Whether the Constitution of the United States, and the Acts of Congress thereon, which certainly do elevate the judgments of the different states of the Union, when sued in another state, above foreign judgments, do not, in every particular, except as to the remedy for enforcing them give to them the same and all the effects of a domestic judgment, which a court of the State, where the judgment was rendered, acting under the laws of the state, would give, is certainly a question deserving of great consideration.

Before the cases of *Mills v. Duryee*, 7 Cranch 481, and *Hampton v. McConnel*, 3 Wheat. 234, decided the effect of a judgment rendered in the state courts, the facility with which such judgments were obtained, behind the back of the defendant, had induced the courts not to treat them very favorably. The same difficulty has occurred in England, with respect to their colonial and Irish judgments. There has been a consequent disposition to limit and explain away the decisions in those cases, and to make them appear as not controverting the decisions which had been previously made in the state courts. In most, if not all the states, it has been considered, that, by a proper plea, it may be put in issue that the court rendering the judgment had not jurisdiction of the parties, and that process was not served on them. We, in this State, have followed in the wake of their decisions; and, in the case of *Pierson v. Mudget*, in Addison County, January 1831, it was determined that a judgment rendered in another State, against a citizen of this State, who was not within the jurisdiction of the court rendering the judgment, and had no notice of the suit, and did not appear, could not be enforced in this State by action of debt on the judgment;—thus considering them in the same light that an Irish judgment (which is no record in England, *Harris v. Saunders*, 10 E. C. L. 373) was considered in the case of *Ferguson v. Mahon*, 39 E. C. L. 38.

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But when the defendant was served with process within the State, where the judgment was rendered, or appeared and submitted to the jurisdiction, the judgment has been held conclusive. *Hoxie v. Wright*, 2 Vt. 263. *Bellows et al. v. Ingham*, Ib. 575. *Blodget v. Jordan*, 6 Vt. 580. That such judgment is to be considered a debt of record, on which the appropriate remedy is by action of debt on the record, and to which the only general issue is *nul tiel record*, was decided, in the case of *Boston India Rubber Factory v. Hoit*, 14 Vt. 92.

Give, then, to the judgment, on which the present action is founded, the effect of a record, and it is very clear that the defendant can interpose no plea, which denies the record. The record does not derive its efficacy from the fact of notice to the parties; but it is valid and effectual, in consequence of its being the judgment of a court of record. The question, then, will arise, whether the defendants, in this case, can deny the fact, which appears by the record, to wit, that both of the defendants appeared in the suit in Massachusetts. It appears to us that the averments in the pleas of the defendants do expressly contradict the record, and that the defendants' only remedy, if the facts are as they have stated them to be, is to apply to the court where the judgment was rendered to vacate the judgment.

In the case of *Malony v. Gibbons*, 2 Campb. 502, in an action on a colonial judgment, where the appearance of the defendant was stated, in the record produced, to have been by attorney, Lord Ellenborough said, that, though he would look to these foreign judgments with great jealousy, yet he would give them credit for the facts which they specifically alleged, and would presume that the court, in that case, saw that the person who appeared was properly constituted attorney for the defendant; and, in the case of *Becquet v. MacCarthy*, 22 E. C. L. 220, the court held, that, where the law of a colony provided that notice of a process might be given to the king's attorney general, in the case of an absent party, but did not expressly provide that he should give notice to the party, upon the presumption that he would do whatever was necessary, the judgment rendered there was not void. Assuredly, if the record of a foreign judgment is to be considered as *prima facie* evidence of no-

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tice to the party, the record of a domestic judgment should be held conclusive in a similar case, inasmuch as a record is of absolute verity, and concludes every thing appearing thereon.

The very point in controversy in this part of the case was decided by Judge Washington, in the case of *Field v. Gibbs*, 1 Pet. C. C. Rep. 155, that where, by the record, it appears that the party appeared and pleaded by attorney, he could not controvert that fact, in an action of debt on judgment in another state. In the case of *St. Albans v. Bush*, 4 Vt. 58, it was decided that the appearance of the party by attorney, appearing from the record, was not to be controverted. And, indeed, notwithstanding some decisions to the contrary, in some of the states, we do not see how this fact, appearing in the record, can be denied and traversed, without setting aside the record altogether; and, from the decisions made in this state, and referred to, we do not consider it now an open question.

With respect, therefore, to the plea of *nil debet* in this action, we consider it is bad, as the debt, on which the plaintiff declares, is a debt of record; and as to the subsequent pleas, the defendant is estopped by the record from averring the facts, therein set forth.

The judgment is therefore affirmed.



HALL & TOWNSLEY v. JOSEPH H. DENISON, and EDWARD R. CAMPBELL, Trustee.

A general assignment, by a debtor, of all his property, for the benefit of all his creditors, executed prior to the enactment of the statute of 1843,—Acts of 1843, p. 7,—is valid, and must be sustained, under the decisions made in this state.

The assent of the creditors to such an assignment will be presumed, although they do not in any way become parties to it, or give any express assent.

And such an assignment is not rendered invalid, nor the presumption of assent of the creditors affected, by its containing a clause giving a preference

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to such creditors as shall, within ninety days, release their claims against the debtor by becoming parties to the assignment,—which contains a clause of release,—if the assignment also contain a general clause, providing for the division of all the property, remaining after paying the claims of the preferred creditors, *pro rata* among all the creditors.

Nor is the validity of such assignment affected, by its containing a clause providing for the delivery of the surplus of the property to the assignor, which shall remain after the assignee shall have fully performed the trust created by the assignment.

And such an instrument imports a consideration,—especially where a nominal consideration is expressed, and the assignee executes a covenant for the faithful performance of the trust.

Upon the execution of such an instrument, the relation of trustee and *cestui que trust* is at once created between the assignee and the creditors, so that the assignor cannot revoke the instrument; and the creditors cannot hold the assignee as trustee under the statute providing for the trustee process, when it does not appear that there will be a surplus remaining in the hands of the assignee, after paying all the debts.

By the statute of 1843,—Acts of 1843, p. 7,—all general assignments, thereafter made for the benefit of creditors, are declared to be, as against such creditors, *null and void*; and this statute prohibits, at least, an assignment of *all the property* of an insolvent debtor, for the benefit of *all his creditors*, even though they are to enjoy it *pro rata*; while it allows of a *preference* to be given to favorite creditors, to the exclusion of others,—and especially, if the insolvent excepts from the assignment a remnant of his property.
BENNETT, J.

TRUSTEE PROCESS. The trustee disclosed, in substance, as follows.

On the eighth day of May, 1841, the principal debtor, Denison, for the consideration, as expressed, of one dollar, executed to the trustee, Campbell, an assignment of all his property, excepting such as was exempt, by statute, from attachment, in trust, to be converted into money, and the proceeds, after paying the costs and charges of the assignee, to be disposed of for the purpose of paying the debts of the assignor, in the order and under the restrictions expressed as follows;—"In the first place, that he shall pay to David Crawford 'a certain note executed by said Joseph, and Edward Hall, to said

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‘Crawford, and thereby to release certain property which has been
‘placed in the hands of said Hall as security for his signing said
‘note as surety for said Joseph H. Denison; then upon trust to pay
‘Lorenzo Field a certain debt due to him from said Denison, and
‘to secure the payment of which said Denison has delivered to said
‘Field two boxes of goods and articles of property; then upon trust
‘to pay and discharge, so far as the same will go, and in rateable
‘proportions, all the just debts, claims and demands of such of the
‘creditors of the said Joseph H. Denison as shall, within ninety days
‘from the date of these presents, become parties thereto by signing
‘and executing the same; and, after the said payments aforesaid, to
‘pay the other creditors of the said Joseph H. Denison, in proportion
‘to the amount of the debts and liabilities in their favor against the
‘said Denison; and if, lastly, any thing shall remain, after making
‘the payments aforesaid, including all the expenses, costs and
‘charges of said trusts, to pay over the balance to the said Joseph
‘H. Denison.”

The assignment contained a clause releasing all claims, which those creditors, who should sign it, had against Denison, and also a covenant, on the part of the trustee, for the faithful execution of the trusts, and was duly executed by the assignor and assignee, but was not signed by any one of the creditors of the assignor, nor was it ever assented to by the creditors, any farther than the law would imply an assent from the facts above detailed. The assignee took possession of the property assigned, and, at the time his disclosure was made, retained it, or the avails of it, in his possession. On the 20th of May, 1841, the writ in the present suit was served upon the assignee, and soon after several of the other creditors commenced actions, summoning him as the trustee of Denison. Some few of the other creditors had notified the assignee that they should claim from him a dividend upon their claims against Denison. The assignee was not a creditor of Denison, at the time of the execution of the assignment.

The county court adjudged that the assignee was chargeable in this suit, as the trustee of Denison, for the property of Denison in his hands, to the same extent as if the assignment had not been made; to which decision the trustee and principal debtor excepted.

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W. C. Bradley for trustee.

It is contended that the assignment, in this case, is good, as the law stood at the time of its execution. The admitting a preference is not objectionable; *Morse v. Slason*, 13 Vt. 307; Angel 27, 28; U. S. Dig. 258, §§ 258, 345, 346; nor is the time limited unreasonable; Angel 123. Nor would the mere requirement of a release defeat it; Angel 103, 111, *et seq.* But, in such cases, if creditors are to have no benefit, except on condition of a release, their assent will not be presumed; 5 Mass. 267; 2 Binney 180; 6 Cow. 271. But an offer of preference, instead of *pro rata* distribution, to such creditors as choose to release, does not vitiate, nor is it a condition coercive; *Lentilhon v. Moffat*, 1 Edw. 464; Angel 109. Nor need the creditors sign the assignment; Angel 179; nor manifest their accession to it; 1 Edw. 262; for their assent is presumed; Angel 168, 178.

A. Keyes for plaintiffs.

The assignment contains a clause of discharge. If the assignment is made in trust for the benefit of preferred creditors, unconditionally, the law presumes their assent; but when there are conditions in the assignment, that the creditors shall release their claims, this presumption does not arise; *Halsey v. Whitney*, 4 Mason 206; *Wheeler v. Sumner*, Ib. 183; *Lippencott v. Barker*, 2 Binney 174; and where there are no preferences, the law does not presume assent; *Widgery v. Haskell*, 3 Mass. 144; *Stevens et al. v. Bell*, 6 Ib. 339; *Russell v. Woodward*, 10 Pick. 415; *Brewer v. Pitkin*, 11 Ib. 298; *Battles v. Fobbes*, 21 Ib. 289; and in such case the attaching creditor is allowed to hold against all the creditors, not assenting at the time of the attachment.

The opinion of the court was delivered by

BENNETT, J. This case involves the legal effect of the assignment of the principal debtor. It is a general assignment of all his estate and effects, for the benefit of his creditors, with the exception of some few articles of trifling value, and which the law exempts from execution. After the payment of all charges and expenses, attending the performance of the trust, and the payment of the debts

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due Crawford and Field, the trustee is to pay, in rateable proportions, the debts of such creditors as shall, within ninety days, make themselves parties to the assignment by signing the same, and, after the full payment of such class of creditors, the trustee is required to pay the other creditors *pro rata*; and the assignment reserves the *surplus*, if any, after the payment of all the debts, to the use of the assignor. It also contains a release of all claims, which those creditors, who should sign it, had against the assignor. The assignment contains covenants, on the part of the *trustee*, for a faithful performance of the trust, and he made himself a party to it, by executing the same. None of the creditors entitled themselves to a preference by signing the instrument and discharging their debts, and no assent of any of the creditors is found, farther than what the law will presume. This suit was commenced the 20th of May, (12 days after the assignment was executed by the assignor and trustee,) and the disclosure was filed the following April.

Our courts have, on several occasions, and, as I think, with great propriety, sustained the validity of general assignments, made, *bona fide*, for the benefit of creditors; and it may well be inquired, why they should not be sustained? In *Pickstock v. Lyster*, 3 M. & S. 375, Lord Ellenborough has said, "that a general assignment for the benefit of creditors is to be referred to an act of duty, rather than of *fraud*, when *none* is proved." It arises out of the discharge of the moral duties attached to the assignor's character, as debtor, to make the fund available for the whole body of his creditors. Bayley, J., speaking of the assignment in that case, says, "that, so far from its being *fraudulent*, it was the most honest act the party could do." It is difficult to conceive, why a debtor, feeling that he has not sufficient property to satisfy all his debts, may not, through an agent, distribute what he has got among his creditors.

It has been said, that general assignments operated as a *fraud* upon our attachment law. But is such an opinion well founded? It may not be altogether apparent, what is precisely meant by this general objection. To assume that they are a *fraud* upon the attachment law is to assume the point which is to be established. A creditor may be defeated, or delayed, in the satisfaction of his debt, either by a *bona fide* sale, or by a preference given to another cred-

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itor. The common law fully sustains the right of preferring one creditor to another. The right arises out of that absolute ownership, which every man has in that which is his own; and it is no fraud, that property is disposed of by an insolvent, *with the intent* to give a preference, unless prohibited by some bankrupt law. If a debtor may prefer one creditor to another, it would seem somewhat strange, that he should not be allowed to prefer *all* to *one*. If it be honest to convey all of a debtor's property, for the benefit of all his creditors, if it be a moral and a just discharge of duty, then it would seem to be a poor objection, that, by such means, one creditor may be defeated of his *process* to levy his whole debt. It should be remembered, that, by the opposite course, other creditors might lose their *whole* debts. The attachment law, it is true, allows a preference to be created *in invitum*. But the legal title to the property passes, by the assignment, to the trustee; and no attachment can be made, which can avail the party, unless, at the time it is made, the property belonged to the debtor.

By the statute passed in 1843, it was enacted, that all general assignments, thereafter made for the benefit of creditors, should, as to such creditors, be *null and void*. What assignments shall be considered *as general*, and coming within the purview of the law, remains to be settled by judicial determination. I take it, the statute at least prohibits an assignment of *all the property* of an insolvent debtor to a trustee, for the benefit of *all his creditors*, even though they are to enjoy it *pro rata*; while it allows a *preference* to be given to favorite creditors, to the exclusion of others, and especially, if the insolvent excepts from the assignment a remnant of his property. Thus *equality* among creditors is discountenanced, in disregard of the long established maxim, that "*equality is equity*."

It seems to me, that general assignments, for the benefit of *all* the creditors, are the class entitled to favor, if any. If made *bona fide*, and their object carried out in good faith, they are well calculated to promote the interest of all concerned, and have almost uniformly received the approbation of the most enlightened jurists. The property should be sacredly applied to the payment of the debts, and the trustee should be held to a faithful performance of his trust. If creditors suffer from the selection of irresponsible, or unfaithful,

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trustees, it would seem that the evils resulting from such a source might be guarded against, by requiring them to give security for the performance of the trust, and also to file inventories of the property assigned in some proper office; and if the trustees are not already sufficiently, at all times, under the control of chancery, the powers of that court over them might be enlarged.

If, then, general assignments to a trustee, for the benefit of creditors, are to be sustained, as this court has more than once decided, the enquiry arises, is there any thing in this case, which should invalidate the present assignment?

No objection can be made to it for a want of consideration. The debts due the creditors constitute a consideration of the highest kind. Besides, a nominal consideration is specified in the deed of assignment; and there is a direct covenant upon the part of the trustee for a faithful performance of the trust. *Wilt v. Franklin*, 1 Binney 517. *Marbury v. Brooks*, 7 Wheaton 556. *Brooks v. Marbury*, 11 Wheaton 78.

We think there is no such stipulation for a release of debts by the creditors, as should invalidate this assignment. The law seems to be quite well settled, that a debtor may indirectly exert an influence over the creditors, through hope and fear, by the insertion of a provision in the assignment, that they shall only be entitled to their order of preference upon their executing a release of their debts within a reasonable time. In this assignment a release is contained for such creditors, as shall, within ninety days, become parties to it. No claim is made, that the time is unreasonable. Those who do not release their debts are not excluded from all benefit under the assignment, but only from a *preference*. As no creditors complied with the condition, upon which they were to be *preferred*, the effect is, that the property must be distributed *pro rata* among all the creditors, with the exception of the two who were preferred without condition. The release was not a condition, upon which the property was to vest in the trustee, but only affected the rate of distribution. If any of the creditors had chosen to have gained a *preference* upon the terms prescribed, their act should not be imputed to a coercive necessity, to prevent an encroachment of all benefit from the assignment, or even of being postponed to

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all other creditors. This must be regarded as a mode of creating a preference among creditors, and the act of releasing the debts voluntary on the part of the creditors, and therefore not objectionable. See *Lippencott v. Barker*, 2 Binney 174; *Cheever v. Clark*, 7 S. & R. 510; *King v. Watson*, 3 Price Exch. Rep. 6; *Halsey v. Whitney*, 4 Mason 206; *DeCaters v. Le Ray De Chaumont*, 2 Paige 449; *Brashar v. West et al*, 7 Peters 614; *Armstrong v. Byrne*, 1 Edw. Ch. Rep. 81; and *Lentilhon v. Moffat*, Ib. 464.

Some of the cases have gone the length of holding, that, if the creditors were excluded all benefit under the assignment, unless, within a given time, they executed releases, still the assignment was not void. It is not necessary to inquire whether we should be willing to go that length. It is sufficient to say, that this assignment does not contain such a provision, as to render it oppressive upon creditors and fraudulent.

It is said that the trustee process should prevail over the assignment, from the want of assent to it by the creditors, prior to the service of the writ. By the common law, in the creation of trusts by deed, it is not necessary that the *cestui que trust* should be a party to the deed, or assent to it, and valid trusts have frequently been created in favor of persons not *in esse* at the time. Ordinarily, all that is requisite is, a person competent to create the trust, and an assignee, competent to take the legal title. I am aware that it has been held in Massachusetts, and I believe in Maine, that the assent of creditors to be benefitted by the attachment was essential to its validity, so as to exclude an intervening attachment by a creditor not a party to the assignment. But, I think, to hold a direct and express assent necessary is a departure from well established principles. The legal estate immediately passes to, and vests in, the trustee; and a court of equity will compel an execution of the trust for the benefit of creditors, though not at the time parties to, or assenting to, the assignment. *Nicoll v. Mumford*, 4 Johns. Ch. Rep. 529. *Brooks v. Marbury*, 11 Wheaton 97. *Gray v. Hill*, 10 S. & R. 436. *Halsey v. Whitney*, 4 Mason 206. *Cunningham v. Freesborn*, 1 Edw. Ch. Rep. 262. *S. C.*, 11 Wend. 240. Rob. on Fraud. Conv. 429, 434.

The relation of trustee and *cestui que trust* is at once created be-

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tween the assignee and the creditors, so that the assignor cannot revoke the instrument. See *Ellison v. Ellison*, 6 Vesey 656, and *Bunn v. Winthrop*, 1 Johns. Ch. Rep. 329. The assent of the creditors, especially where the assignment is to the trustee for the benefit of all the creditors, without the annexation of any condition, will be inferred, as a presumption of law, unless the contrary appears. The common principle is, that a grantee is presumed to assent to a conveyance, which is for his benefit, and the same principle well applies to the *cestui que trust*. It must be for the benefit of the creditors to receive all the effects, which the debtor has, in the liquidation of their debts. *Wilt v. Franklin*, 1 Binney 518. *Halsey v. Whitney*, 4 Mason 215. If the creditors are to have the benefit of the assignment, only upon the condition that they discharge their debts, their assent might not be presumed. In such case, it would involve a question of discretion, in regard to which there might be a difference of opinion. In the present case the want of an express assent can only affect the right to a *preference*, and, it being for the benefit of all the creditors to take *pro rata* shares under the latter clause of the assignment, their assent to such a distribution may well be presumed. With the exception of the two creditors named, who had security for their debts prior to the assignment, the effect is to make a *pro rata* disposition of all the property of the insolvent among all his creditors, and it is an ancient maxim of the law, that *equality is equity*.

As this is a general assignment for the benefit of all the creditors, there can be no objection to the reservation of the surplus to the assignor, after all his debts are paid. The surplus would, by implication of law, without any express reservation, result to him. If the reservation to the assignor could injure any of the creditors, it might merit a different consideration.

No claim is made to charge this trustee upon the ground of a surplus, after the payment of the debts, still remaining in his hands.

The result is, the judgment of the county court is reversed, and the trustee is discharged, with his costs; and the judgment against the principal debtor is affirmed, without costs in this court.

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CHURCHILL & BAILEY v. ASA BOYDEN, Administrator of JAMES MINOT.

When an ancillary administration is granted in this state upon the estate of one who was a resident of another state, creditors residing in such other state are not entitled to have their claims allowed by the commissioners appointed here.

If the funds found here are more than sufficient to pay the creditors residing here, the court will not ordinarily make any decree of distribution among heirs, or legatees, but will remit the balance to the principal administration;—but this is a matter resting in their discretion. REDFIELD, J.

If the estate is solvent, the resident creditors will be entitled to full payment of their claims here; but if insolvent, then the prevailing practice is to pay the resident creditors *pro rata*, taking into the account all the creditors and the whole estate, so far as can be ascertained. *Per* **Is.**

But in the state where the principal administration is, the entire mass of the creditors are entitled to have their claims allowed, and to share ratably in the assets, until fully paid. *Per* **Is.**

Defects in form, merely, in a plea will not be reached by general demurrer..

APPEAL from the decision of commissioners, disallowing the plaintiffs' claim upon the estate of James Minot, deceased.

The plaintiffs declared upon a promissory note, executed by the deceased in the State of New York. To this declaration the defendant pleaded that the plaintiffs ought not to have and maintain their action "against the estate of the said James Minot, deceased, in this State," because they alleged, "that the said James Minot, at the time of the making of the contract in the plaintiffs' declaration mentioned, and until his decease, resided and had his domicile at Pomfret, in the county of Chautauque, and State of New York, during all which time, and hitherto, the plaintiffs have resided in the city, county and state of New York; and that, immediately after the decease of the said James Minot, to wit, on the tenth day of November, 1842, administration was duly granted in said State

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'of New York to one W. S. Hackley, to administer said estate, 'who thereupon accepted said trust, and ever since hath administered the same." To this plea the plaintiffs demurred generally.

The county court rendered judgment in favor of the defendant ; to which decision the plaintiffs excepted.

W. C. Bradley for plaintiffs.

The plea of the administrator is considered bad in substance.

1. It does not set forth by what authority any other administration was granted. 2. Nor sufficiently describe where the other administrator is to be sought for. 3. It avers that administration was granted in New York of "said estate," when no other but "estate in this jurisdiction" had been previously mentioned,—which makes a void administration. 4. The domicile of the deceased is not *directly* alleged to have been without this state. 5. It is not alleged whether there is any *estate* without this jurisdiction. 6. The fact that the contract was made and the creditor resided in another state ought not to be sufficient to bar the plaintiffs' claim. The statute expressly says that the commissioners are to be appointed "to receive, examine and adjust *all* claims and demands of *all* persons against the deceased." Rev. St. p. 277, § 1. It is true, that, after the assets are collected and the debts ascertained, the administrator is to pay the creditors in a certain order, if there is not sufficient to pay the whole ; Rev. St. p. 282, §§ 31–33 ; and that the probate court may make decree for the payment "among the creditors, as the circumstances of the case shall require." But this, so far from contravening the former provision, evidently supposes that the discrimination is not to be made until the decree of distribution, when the circumstances can all be taken into consideration.

It is no objection to this view that the statute,—page 274, sect. 36,—provides that, when *debts* against the deceased person in this State do not require a sale of real or personal property, it may be sold to pay debts and legacies in another State, because such a provision would be necessary in the counter case, where the property, and not the debts, was in this jurisdiction ; and, furthermore, real estate is not, at common law, assets, nor governed by the *lex domicilii* (2 Kent, Lect. 37) until made so by the statute.

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This view is corroborated by the phraseology, which, if the legislature intended to give a preference to its own citizens, would have been so shaped as to have given that preference, after the payment of all debts, in the payment to them of legacies, and not of debts only,—such being the doctrine where the rule of preference prevails. *Harvey v. Richards*, 1 Mason 381.

The case of *Hunt v. Fay, Adm'r*, 7 Vt. 170, presented a different point,—viz, whether a creditor, barred from claiming in the *forum domicilii* in which he resided, might afterwards claim in another jurisdiction, where property of the deceased was situated;—here the question is, can he claim there at all?

A Keyes for defendant.

The ancillary administration is made subservient to the rights of creditors within the country; and the balance may be transmitted to the principal administration. *Vaughn v. Barrett*, 5 Vt. 333. *Eames' Adm'r v. Cr's of Eames*, 4 Vt. 256. *Porter's Heirs v. Heydock*, 6 Vt. 374. *Hunt v. Fay, Adm'r*, 7 Vt. 170, 183.

The opinion of the court was delivered by

REDFIELD, J. The only question here is, whether the creditors of an estate, when the principal administration is out of this State, and an administration of estate within this State has been granted here, are all alike entitled to have their demands allowed by the commissioners appointed here; or whether the commission extends only to resident creditors. We think it may be considered well settled, in this State, that it is only the latter class of creditors, who are entitled to have their claims allowed here. This subject has been fully considered by this court, and their views were expressed and reported many years since. *Vaughn v. Barrett*, 5 Vt. 333. *Hunt v. Fay, Adm'r*, 7 Vt. 170. *Porter's Heirs v. Heydock*, 6 Vt. 374.

I am aware, that, upon general principles of *moral equity*, there may be much said against this rule of allowance. But the law seems to be so settled in most of those countries where the common law of England prevails, and in many others. It has never been questioned that the court of probate, where the ancillary adminis-

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tration is, will take no notice of foreign creditors, and not usually of foreign legatees, or distributees. *Daves v. Head*, 3 Pick. 128. *Davis v. Estey*, 8 Pick. 475. *Mothland v. Wiseman*, 3 Penn. R. 185. *Miller's Estate*, 3 Rawle 312. Story's Conf. of Laws 334, 336-7. 2 Kent 434 and note.

Some question has been made, whether resident creditors shall be fully paid, if the funds here are sufficient, although not sufficient in all to pay all the creditors. It has also been questioned, how far the courts of the subsidiary administration will proceed to distribute the funds found there among the heirs, or legatees. The prevailing practice upon this latter point is, I apprehend, as above stated, not to decree any such distribution, but to remit the funds to the principal administration. But it is admitted that, even here, there is a discretion in the courts where the funds are found; and, if they do remit them, it is merely from courtesy. *Porter's Heirs v. Heydock*, 6 Vt. 374. *Richards v. Dutch*, 8 Mass. 506. *Daves v. Boyleston*, 9 Ib. 337. *Stevens v. Gaylord*, 11 Ib. 257.

In regard to the payment of resident creditors, the general practice seems to be to pay them *fully*, when the estate is upon the whole clearly solvent,—but if insolvent, to pay them *pro rata*, taking all the creditors and all the estate, so far as can be ascertained, into the account;—although this latter qualification of the rule first stated, of paying *all* resident creditors, is by no means uniform. Each separate administration is foreign to all the others, and absolutely independent of all of them, and may do as it will. But in the principal administration the entire mass of the creditors are *entitled* to have their claims allowed, and to share ratably in the assets, until fully paid. And the more equitable course, because the more equal, would be to have the funds found in other States there collected, and remitted to the principal administration. And this would be done, were it not for the possibility that all the creditors *might* not then be treated *alike*;—so, to “trammel up consequences,” we choose to pay *our* creditors first,—generally to the extent of their ratable proportion at least.

This is the settled law; and it is only for this purpose that any commission is here issued in the case of a subsidiary administration. It does not seem much like courtesy, or confidence in others, and

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savors not a little of the times, when a *foreigner* and a *barbarian* were the same, and a *foreigner* and an *enemy* were expressed by the same word,—*hostis*. But the law is so settled,—“*ita lex scripta est*,”—and, under the modifications above stated, which it is not to be presumed the probate court will disregard, there seems little danger of injustice in the final result. And should the probate court finally make an improper decree, those injured have their remedy by appeal.

The other defects are considered merely formal, and not reached by general demurrer.

Judgment affirmed.



DANIEL FISHER, Executor of HANNAH HOLLAND, v. PARDON T.
KIMBALL AND OTHERS, Appellants.

A married woman may dispose of her estate by will, by the consent of her husband, given in writing under his hand and seal during the coverture.

And *quære*, whether, in this State, any contract, or consent, by the husband is necessary, in order to render such will valid. REDFIELD, J.

THIS was an appeal from a decree of the court of probate, approving the will of Hannah Holland, deceased. The several pleas of the appellants were, first, that the testatrix never executed the will offered for probate,—secondly, that, at the time of the supposed execution of the will, the testatrix was not of sound mind,—thirdly, that the will was obtained by the fraudulent and unfair practices of the executor,—and fourthly, that the testatrix, at the time of the supposed execution of the will, and from thence until the time of her decease, was under coverture of one Abraham Holland, her husband, who was still living. On the three first pleas issue was joined; and to the fourth plea the executor replied that the will

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was executed by the testatrix with the license and consent of her husband, the said Abraham Holland, given to her in writing under his hand, before and at the time of the execution of the will. On this replication issue was joined. Trial by jury.

On trial the executor offered in evidence the will in question, which commenced with a recital that the testatrix was the wife of the said Abraham Holland, and had the right to make her last will and testament, by the law of the land, by a legal contract between the said Abraham Holland and herself previous to the marriage, and by his express consent since and at all times during the marriage, and which purported to convey personal estate only; to the admission of which, in evidence, the appellants objected; but, the execution being duly proved by the attesting witnesses, it was admitted by the court. This instrument bore date March 6, 1839.

The executor then offered testimony tending to show that said instrument was executed under a license, given by the husband for that purpose, and that he was competent to execute the same; and, in support thereof, offered three several papers, which were proved to have been signed by the persons whose names were appended thereto. The first was an agreement, under seal, executed by Abraham Holland and his wife, after their marriage, bearing date September 24, 1824, which recited an agreement made between them previous to their marriage, and in consideration of the same, that all the property of each should continue to belong separately to each in the same manner as if the marriage should never occur; and which, in furtherance of the said prior agreement, expressly provided, among other things, that the said Hannah should "keep and retain to her sole and separate use and benefit, and her heirs, all the goods, notes of hand, rights, credits and personal property, which belonged to her at and before her marriage with the said Abraham;" and that she might "at any time use said property as she might think proper, and dispose of the same in whole, or in part, by gift, sale, will, or in whatever manner she might think proper;" and which, after reciting that Daniel Fisher then had charge of the property of the said Hannah, contained this clause,— "It is hereby understood that the said Daniel is appointed the trustee for the said Hannah, to take the charge and direction" of her

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said property, and to manage and account for the same according to certain specified provisions.

The second paper offered in evidence by the executor was signed by Abraham Holland, not under seal, and bore date August 4, 1838, and purported to be an expression of his "free and full consent" that the said Hannah might "make and execute her last will and testament, giving and bequeathing to whom she pleases all her estate and property of every description." The other paper offered was of like tenor, and executed by Abraham Holland in like manner, and bore the same date with the will offered for probate,—March 6, 1839. All which papers were objected to by the appellants, but admitted by the court.

The appellants then gave evidence tending to prove that the said Hannah and Abraham, by reason of age, &c., were incapable of making a will, and that the said Abraham was also incapable of giving his consent to the same, or of understanding the nature of the instrument which he executed.

The executor then offered in evidence a writing, signed by Abraham Holland, dated January 24, 1843, purporting to express the consent of the said Abraham to the probate of the will offered; and also a former will, made by the deceased, dated Aug. 7, 1838, as evidence tending to show that the dispositions and intentions of the said Hannah were, at the time of making the same, essentially similar to those expressed in her said last will; both which papers were objected to by the appellants, but admitted by the court.

Testimony was farther offered by the executor, tending to prove that the husband had said, previous to the making of the will offered, that, by an agreement made between him and his wife, previous to their marriage, he was to have none of his wife's property, and she was to have none of his,—that he had no care or concern about the property,—that she might dispose of the same,—and that what was her will was his will; all which was objected to by the appellants, but admitted by the court.

The court charged the jury, among other things, that, in order to find the issues in favor of the executor, they must be convinced from the testimony that the said Hannah, at the time she executed the will in March, 1839, was of sound and disposing mind and

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memory, capable of understanding the business she was about to do, and of forming the intention of disposing of her property by will; that they must also be convinced that the said Abraham, at the time he executed the license in March, 1839, was capable of giving his consent to the making of the will, and understood the nature of the instrument he then executed, and did give his consent to the said Hannah's making the will in question; and, farther, that they must be convinced that no fraudulent or improper practices were exercised over either the said Hannah, or the said Abraham, by the executor.

The jury returned a verdict in favor of the executor on all the issues joined. Exceptions by appellants.

W. C. Bradley for appellants.

The first question presented is, whether a *feme covert* can make any will. She clearly could not, of real estate, whether with or without the consent of her husband. Slade's St. 336, § 16. Pow. on Dev. 94. 1 Mod. 211. *Osgood v. Breed*, 12 Mass. 525. *Marston v. Norton*, 5 N. H. Rep. 205. *Picquet v. Swan*, 4 Masson 443. Bracton, lib. 2, cap. 26, fol. 60. Fleta, lib. 3, cap. 3, p. 178, § 12. Moore, page 339, case 459.

If the court shall be of opinion that she might have made a will with the consent of her husband, being, after all, a gift,—See authorities *ut sup.*,—the question arises, whether, as by our statutes personal property is made distributable as by descent, and must be disposed of with the same solemnities as real estate, a change in the common law has not been produced in that particular; and also whether, in this case, such consent was properly given; and whether the point was regularly presented to the jury. It is now evident, from the whole case, that whatever consent was given had reference to an agreement reduced to writing after the marriage, and that the will was executed with a view to that agreement; for the husband always expressed himself as having parted with all control over the property brought by the wife, and the testatrix refers to a contract existing long before the execution of the will. If this contract is void, it is apparent that the parties acted under mistaken impressions as to their rights, and so that no fair consent was given.

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The contract, as shown by the executor, is that of Sept. 24, 1824. Now no law is clearer, than that married persons cannot covenant with each other without the intervention of a trustee; and Daniel Fisher is no party to that instrument. If it be said that that is a mere expression of consent, it appears otherwise; for it carries within it a consideration which is totally void;—for, as a release of the wife's right to the husband's personal property, it amounts to nothing; and, as a release of dower in his estate, it would be nugatory without a jointure. And, as one taking by execution of a power takes under the power, in the same manner as if it had been incorporated in the instrument,—*Marlboro' v. Godolphin*, 2 Ves. 78,—so, if the power fails, the instrument made under it fails likewise.

If it be said, that, notwithstanding this objection, the instrument, if found by the jury, may be taken as a declaration of a trust, *ante nuptial*, or otherwise, in Daniel Fisher, without his signature, to hold all the property which she was to dispose of, and as consent by the husband that the wife might make a disposition and appointment of the same by will,—then we say that that important instrument ought to have been so put to the jury, and the point not have been left to rest upon the mere fairness of the execution of the license of March, 1839.

It is also objected that the writing of Jan. 24, 1843, and the will of Aug. 7, 1838, should not have gone to the jury.

Kellogg and Tyler for executor.

1. The execution of the will being proved, the will itself was properly admitted in evidence to the jury. *Reeve's Dom. Rel.* 141–2, 144, 149. *Cro. Car.* 219, 376. 2 *Ves.* 75, 190. 1 *Wend.* 111. *Hearle v. Greenbank*, 3 *Atk.* 709. 2 *Ib.* 69. *Jaques v. M. Ep. Ch.*, 17 *Johns.* 548. 2 *Kent.* 170. 3 *Johns. Ch. R.* 481.

2. The agreement dated Sept. 24, 1824, and signed by the testatrix and her husband, and the paper signed by Abraham Holland, dated Aug. 4, 1838, and the paper signed by him dated March 6, 1839 were properly admitted in evidence, as they tended to prove the issue taken upon the plaintiff's replication to the fourth plea.

3. The paper dated Jan. 24, 1843, executed by Holland, giving

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his consent to the probate of the will, was correctly admitted; it was a ratification of the will.

4. The declarations of Abraham Holland, as to the right of his wife to make a will disposing of her property by reason of an agreement made between them before marriage, were proper to be given in evidence, as tending to show that he was not imposed upon, but had uniformly understood it in conformity with the written licenses which he had given at various times.

The opinion of the court was delivered by

REDFIELD, J. The only question, properly arising in this case, is in regard to the right of a married woman to dispose of her separate personal estate by will. By statute, in this State, the right to dispose of real and personal estate is put upon the same ground, with the exception of nuncupative wills of personal estate to the value of two hundred dollars, which shall be reduced to writing by some witness within six days after they are made, and presented for probate within six months after the death of the testator.

In England married women are expressly excepted from the statute of wills. They cannot, therefore, dispose of their real estate, nor of their personal estate, except it be such as is settled to their separate use, or which they hold in the right of another, as trustees merely. But it seems to be conceded on all hands, that, even there, a married woman may dispose of all her estate by will, with the express consent of her husband, or where, by marriage settlement, the husband expressly consents that she shall have this right. 2 Kent 170. Reeve's Dom. Rel. 137 *et seq.*

As our statute expressly *excepts* from the right of making wills persons not of full age and sound mind, it is supposed by many that it must *include* married women. Judge Reeve seems to take this view of similar statutes;—and, if it were necessary, I think very good reasons might be urged in favor of that view.

No farther objection is raised to the trial below, except to the form of putting the case to the jury; and we do not perceive that that is objectionable.

Judgment affirmed.

 Stafford v. Ballou et al.

SAMUEL STAFFORD v. CYRUS BALLOU AND OTHERS.

[IN CHANCERY.]

The practice of allowing a decree to pass in the court of chancery *sub silentio*, with a view to taking an appeal, commented upon.

Whatever is sufficient to put a party upon inquiry is sufficient to affect him with notice of all those facts, which he might be presumed to have learned upon reasonable inquiry.

When a person has a mortgage upon land, and another person has a subsequent mortgage, if the second mortgagee stand by and see the mortgagor induce the first mortgagee to release his mortgage and take the assignment of another security, which he supposes to be next to his own, but which is in fact subsequent to the second mortgage, such subsequent security will be preferred to the second mortgage.

APPEAL from the court of chancery. It appeared that the case was not heard by the chancellor, but a decree passed by consent, with a view to bring the case here. This court (REDFIELD, J.) took occasion to say that such a practice, if it became general, must be attended with many evils; that the court were not then prepared to adopt the New York rule *instante*, and affirm all such decrees *sub silentio*; but they had no doubt that such a rule, when properly promulged, might be judicious and necessary.

The court remarked, in delivering the final decree, and remanding the case to the chancellor, that it was quite impossible that this court could, in the short time allowed them, do the same justice to a voluminous chancery case, which the chancellor could have done to it, had it been submitted to him; and that a hearing before him might very likely have obviated all desire for an appeal,—and, at all events, would have so far made the counsel aware of the important points in the case, as very much to have abridged the labor of this court.

The case depended upon the proofs mainly; and it is not deemed important to report them in detail. The court held, that whatever was sufficient to put a party upon inquiry, was sufficient to affect him with notice of all those facts, which he might be presumed to have learned upon reasonable inquiry, according to the rule laid down in *Green v. Slayter*, 4 Johns. Ch. R. 38.

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The court farther held, that, where one person had a mortgage upon land, and another person held a subsequent mortgage, if the second mortgagee stood by and saw the mortgagor induce the first mortgagee to release his mortgage and take an assignment of another security, which *he* supposed to be *next* to his own, but which was in fact subsequent to the second mortgage, such subsequent security should be preferred to the second mortgage,—that the second mortgagee, having signed the assignment as a witness, and having for a long time treated it as prior to his own claim, and thus led the orator into the belief that such was the fact, must now be bound by it.

D. Kellogg and W. C. Bradley for orator.

A. Keyes for defendants.



DANIEL ELLIS v. DAVID HOWARD, LUCIUS DEAN AND WILLIAM D. LEONARD.

One, who has assigned and transferred personal property to his creditor in payment of a debt, is a competent witness for the creditor, in an action of trespass brought by him against other creditors of the same person, who have attached and taken from the plaintiff's possession the assigned property, notwithstanding the officer, who served the defendant's writs of attachment, included in his fees minuted upon the writs charges for taking and securing the property in question.

Where two creditors sue out separate writs of attachment against the same debtor, and put the writs into the hands of the same officer, who serves them at the same time by attaching upon them the same property of the debtor, they are, *prima facie*, jointly concerned in the taking of the property, and must be so holden, in an action of trespass brought against them and the officer for such taking;—but it is competent for either of the defendants to show that he had no concern in the taking, or that the taking on the two writs was at different times.

The declarations of the vendor of personal property, as to the character of the sale made by him, are not evidence against the vendee, in an action of

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trespass brought by the vendee against the creditors of the vendor, who have attached the property as belonging to the vendor, notwithstanding such declarations were made before the attachment, and while the vendor still retained the property in his possession.

Where the defendants in an action of trespass had attached the property of the plaintiff as the property of the debtor of two of the defendants, and the attaching officer, who was also made defendant in the action of trespass, had delivered the property to a third person, who executed a receipt therefor, thereby promising to re-deliver the property to the officer upon demand, and the plaintiff commenced his said action of trespass, and then assigned his claim in said action to the said receptor, and judgment was afterwards duly obtained and execution issued in the suit in which the attachment was made, and the officer having the execution duly demanded the property of the receptor, and the receptor refused to surrender the property, and retained it in his possession, it was held that the defendants, on the trial of the action of trespass, were not entitled to give in evidence, in mitigation of damages, such refusal on the part of the receptor, they never having offered to surrender to him his receipt, or discharge him from his liability thereon.

TRESPASS de bonis asportatis. Plea, the general issue, and trial by jury.

The plaintiff claimed title to the property in question by virtue of an assignment and transfer of the same to him by one Abel Houghton, the former owner thereof, made to secure the plaintiff for certain debts, and against certain liabilities which he had incurred for said Houghton's benefit; and the plaintiff proved that the property was in his possession, at the time it was taken by the defendants.

To prove the taking by the defendants the plaintiff gave in evidence a writ of attachment, and the officer's return thereon, in favor of the defendant Howard against Houghton, which was served, Aug. 26, 1843, by the defendant Leonard, as constable, by attaching thereon the property in question; and the plaintiff then offered in evidence a writ of attachment, and return thereon, in favor of the defendant Dean against the same Houghton, which was also served, as appeared by the return by the same defendant Leonard, as constable, on the same 26th of August, 1843, by attaching thereon the same property. To the admission of this last writ and return the defendants objected, upon the ground that the plaintiff,

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having undertaken to show a trespass in the taking by virtue of said Howard's attachment, could not afterwards be allowed to prove a trespass by virtue of said Dean's attachment. But the objection was overruled; and the court held, that, the attachments appearing to have been made at the same time, and bearing the same date, and having been served by the same officer, it was *prima facie* evidence of a joint taking by the defendants and a trespass;—but that the defendants were at liberty to show that either of them was not concerned in procuring the attachment, or that the attachments were made at different times. The plaintiff also proved that judgments were duly recovered, September 30, 1843, in the suits in which the attachments were made, on which executions were issued, and that the property was duly demanded, by the officer holding said execution, of the persons who receipted the same to the attaching officer.

The plaintiff, also, to prove his title to the property, offered in evidence the deposition of the said Abel Houghton; to the admission of which the defendants objected, upon the ground that Houghton would, in case the assignment was established, diminish his liability to the plaintiff to the amount of the full value of the property; but that, in case the attachments were sustained, his indebtedness would be diminished by an amount as much less than the value of the property, as the officer's fees for attaching the same property would amount to, and that therefore Houghton was interested for the plaintiff, and incompetent as a witness; and it appeared that the attaching officer had, on each of said writs, made a charge for securing said property;—but the court admitted the deposition.

The defendants offered to prove, that, after the assignment of the property to the plaintiff, Houghton exercised acts of ownership over the property, and also offered to prove declarations, made by Houghton after the assignment, and while a horse, which was assigned to the plaintiff at the same time with the property in question, and a lumber wagon, which was part of the property sued for, were in Houghton's possession, as to whose the property was, and his offers to sell it,—but not that the plaintiff knew of these declarations, or offers; to the admission of proof of which declarations the plaintiff objected, and the court excluded the testimony.

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The defendants also offered evidence, in mitigation of damages, tending to prove that the attaching officer, on the 30th day of August, 1843, delivered the property in question to Clark Puffer, and that the said Puffer and Ebenezer Huntington thereupon executed a receipt therefor to the officer, thereby promising to re-deliver the same property to the officer on demand; that the plaintiff, on the 30th day of September, 1843, by deed, duly executed, conveyed all his property, both real and personal, and "all his dues, rights and demands," to the said Puffer; and that said Puffer still retained the possession of the said property, notwithstanding it had been duly demanded of him by the officer holding the executions issued upon the judgments rendered in the actions in which the property was attached; to which testimony the plaintiff objected, and it was excluded by the court.

The jury returned a verdict for the plaintiff. Exceptions by defendants.

A. Keyes for defendants.

1. To determine whether a witness is disqualified, or not, does not involve the inquiry as to the amount of interest. *Starkie's Ev.* In this case it appeared that the constable, Leonard, charged twenty five cents for his trouble in securing and removing the property in question on each writ. Now that Houghton, or his property, would be liable to those sheriff fees, there can be no doubt, if the property attached was Houghton's, and was liable to the attachment. But, on the other hand, that Houghton, or his property, would not be liable to the expense of securing and removing the property of third persons is equally clear; thus Houghton's interest appears to be direct and certain.

The defendants insist that the county court erred, in deciding that, the attachments appearing to have been made at the same time &c., it was *prima facie* evidence of a joint taking and a trespass, until the plaintiff had farther proved that Dean and Howard either directed, or assented to, said attachments. 1 Chit. Pl. 80, 180, 185, note 1. *Steyel v. Lawrence et al.*, 3 Day 1. *Vail v. Lewis et al.*, 4 Johns. 450. *Adams v. Freeman*, 9 Johns. 117. *Hollister v.*

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Johnson, 4 Wend. 639. 1 Metcalf & Perk. Dig. 315. *Cilley v. Jenness*, 2 N. H. Rep. 87.

3. The defendants insist that the county court erred in excluding the sayings of Houghton, as to whose the property in question was, made after the sale and while he remained in possession, though without the knowledge of the plaintiff. 2 Phil. Ev. 177, note 180. *Willies v. Farley*, 3 C. & P. 395. 2 Phil. Ev. 589, note 452. *Ib.* 602, note 481.

4. The defendants insist, that, as Clark Puffer, the receiptor of the property in question, is the party in interest in the present suit, and would have a sufficient defence to an action upon the receipt, if the property proved to belong to Ellis, or not liable to the attachments, the evidence offered should have been admitted in mitigation of damages. *Cilley v. Jenness*, 2 N. H. Rep. 87. 1 Metc. & Perk. Dig. 316. *Cooper v. Mowry*, 16 Mass. 8. *Learned v. Bryant*, 13 Mass. 224. *Denny v. Willard*, 11 Pick. 519. *Fisher v. Bartlett*, 8 Greenl. 122. 4 Mass. 498.

Kellogg and Roberts for plaintiff.

1. The deposition of Abel Houghton was properly admitted. 1 Phil. Ev. 52. *Bland v. Ansley et al.*, 2 New Rep. 331.

2. The attachments appearing to have been made at the same time, and bearing the same date, and having been served by the same officer, Leonard, the court were correct in deciding that it was *prima facie* evidence of a joint taking and trespass by the defendants.

3. The sayings of Abel Houghton, as to the ownership of the property, after the sale to Ellis, were correctly excluded by the court.

4. The court properly excluded the evidence offered, that Puffer receipted the property attached on the writs of the defendants.

The opinion of the court was delivered by

WILLIAMS, CH. J. There are several questions made in this case by the counsel for the defendants, but none of them very difficult. The first question is, whether the deposition of Houghton should have been admitted. The plaintiff claimed by virtue of

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a sale from Houghton, and the defendants by virtue of an attachment, which Howard and Dean, as creditors of Houghton, and Leonard, as their officer, caused to be served on the property in question. The interest of Houghton was either balanced, or, if he had any interest, it was in favor of the defendants. This was decided in the case of *Seymour v. Beach*, 4 Vt. 493. The authority of that case has never been questioned; but it has always been recognized.

The next question is, in relation to the attachment of Dean, one of the defendants, after the plaintiff had proved the attachment of Howard, another defendant, both of which were served by Leonard; but, inasmuch as we learn from the case that there was but one taking, apparently at the same time, by Leonard, at the suit of Howard and at the suit of Dean, it was, *prima facie*, a joint trespass in the whole; but either of the defendants was at liberty to disprove any concern on his part in the transaction, or to show that the attachments were made at different times. On this point in the case we think the county court were correct.

The next question, which was raised, was as to the offer to prove the declarations of Houghton, and that he exercised acts of ownership, and what he said as to the ownership of the wagon, and that he offered to sell. The horse was not in controversy in this suit, and, if the wagon was in the possession of Houghton at the time of the attachment, the defendants would have been justified, on the well established principle, that, unless possession accompanies and follows the sale of personal property, it is liable to attachment and execution for the debts of the vendor. That the sayings of Houghton were correctly excluded is apparent from the principle, that, when a person is alive, and may be a witness, his declarations are not to be received; and the declaration of the holder of property, as to the character of a sale by him, was excluded in the case of *Carpenter v. Hollister*, 13 Vt. 552, and in *Hines et al. v. Soule*, 14 Vt. 99; and moreover these declarations related to property not the subject of this suit.

The only remaining question is in relation to the receipt executed by Puffer and Huntington,—whether it should be admitted and received in mitigation of damages. This is the only point on which the court are not all agreed,—one of the members of the court

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thinking it should have been received in mitigation of damages. It appears that the trespass, of which the plaintiff complains, was committed, on the 26th day of August, 1843, by the defendants' attaching the property in question. On the 30th day of the same August Ebenezer Huntington and Clark Puffer receipted the property attached to the defendant Leonard, the officer, promising to deliver the property to him on demand. On these attachments judgments were rendered on the 3d of September, 1843, executions were issued and delivered to an officer, and the property was demanded within thirty days, and was not delivered. After the present suit was commenced, and while the same was pending, September 26, 1843, Ellis conveyed by assignment all his estate and all his dues, rights and demands to the said Puffer.

The plaintiff's right of action against these defendants was complete before this. The defendants have not returned the property to the plaintiff, nor have they relinquished their claim on the same. They still hold the receipt against Puffer and Huntington, and their claim on the officer for the property attached. As it respects the plaintiff, the defendants have taken and withheld the property attached, and still claim to hold the same. As the defendants have manifested no disposition to give up the property attached, or to give up their claim to the same, and still hold the receipt, and have not offered to give up the same to Puffer, they cannot inquire into the sale and assignment from the plaintiff to Puffer, nor can it be made a subject of inquiry in this case, whether Puffer could defend himself against a suit on that receipt. By taking the property on the attachment against Houghton, demanding it on the executions of the receiptor, and still holding the receipt, they cannot be relieved from the consequence of their original trespass, which has not been justified.

If a confirmation of the views of the majority of the court were wanting, it is found in the decision of the case of *Robinson v. Mansfield*, 13 Pick. 139, where it was decided, in a case almost identical with this, that the rule of damages, in such a case, is the value of the goods at the time of the attachment, inasmuch as the officer held the receipt, and did not give it up before, or at the trial.

The judgment of the county court is affirmed.

Sherwin v. Bugbee.

JEMIMA SHERWIN v. ALPHEUS BUGBEE.

[Same Case, 16 Vt. 439.]

It is necessary that the warning for a meeting of a school district should be recorded by the district clerk.

If it do not appear from the record of the warning, in such case, that the hour of the day for the meeting was specified in the warning, the defect cannot be supplied by parol evidence, that, in the original warning, the hour for the meeting was named.

Nor can the collector of a tax, raised at such meeting, who seeks to justify the taking of property by virtue of his warrant, be allowed to supply such defect in the record by parol evidence, that all the legal voters in the district were present at such meeting, and voted upon the question of raising the tax.

Any fact, which should be matter of record, should be proved by the record.

TRESPASS for taking a pair of oxen. Plea, the general issue, with notice that the defendant would justify the taking as collector of school district No. 4 in Windham. Trial by jury.

On trial, the plaintiff having proved the taking, as set forth in the declaration, the defendant, in pursuance of his special notice, proved the organization of the district, in accordance with the decision of the Supreme Court in this case, at the February Term, 1844, (16 Vt. 439) and then read, from the records of the district, the warning of the district meeting, at which the tax, for the payment of which the oxen in question were taken, was voted. It did not appear, from the record of the warning, that the hour of the day, at which the meeting was to be holden, was specified in the warning, and the defendant offered parol evidence, to prove, that, in the original warning for the meeting, which was posted up in the district, the hour of meeting was set at six o'clock in the afternoon; to the admission of this evidence the plaintiff objected, and it was excluded by the court.

The defendant then offered to prove, by parol evidence, that, at the said meeting, at which said tax was raised, all the legal voters of the district were present, and voted, and that they all met about

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the same time,—which was about the hour of six o'clock in the afternoon. This evidence, also, being objected to by the plaintiff, was excluded by the court.

The defendant then moved the court to continue the cause, and permit the clerk of the district to amend his records, so as to conform to the fact, as to the warning. To this the plaintiff objected, and the court refused to grant the continuance, and directed the jury to return a verdict for the plaintiff, for the value of the oxen, if they believed the evidence, introduced by the plaintiff, as to the taking of the oxen and the plaintiff's right of property in them. To all which decisions of the court the defendant excepted.

A Keyes for defendant.

1. There was error in the county court, in refusing to admit parol proof of the warning. To entitle any writing to the credit of a record, it must have been recorded by requirement of law. The statute does not require the warning to be recorded; it only requires the clerk to record the votes and the proceedings of the meeting.

2. The court erred, also, in rejecting parol proof that all the members of the corporation were present at the meeting and voted. If the members of a corporation are duly assembled for one purpose, they may record notice and proceed to other business. But if some of the voters are absent, or refuse their assent, the proceedings are void. *Rex v. Theodorick*, 8 East 543. *Rex v. Gaborian*, 11 East 87, note. Angel & Ames on Corp. 39. If it be said, that the statute requires notice posted up, we answer, a notice was given, by posting up, as the law directs, which called all the voters, all who had a voice in the meeting, together about the same time. If some are notified and assemble, and others assemble without notice, and they all act in the proceedings, it is a record of notice. *Rex v. Oxford*, Palm. 453. Ang. & Am. on Corp. 394.

W. C. Bradley for plaintiff.

It appeared by the notice, as recorded in the records of the district, that the provision of the statute, in reference to the warning required, was not complied with, as to time, and it is contended by the plaintiff, that this defect cannot now be supplied, as parol proof

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is not admissible to add to the record,—*Britton v. Lawrence et al.*, 1 D. Chip. 105,—except where it is necessary to *explain* the record,—Cowen's Phillips 839, 840, 971-2,—especially in a case to which the corporation itself, by whose officer the record was made, is a party; *Hutchinson v. Pratt*, 11 Vt. 418.

But it is said that this was not regularly a record, because the statute does not require the warning to be recorded; but we contend it is so required; for it is made the duty of the Clerk "to keep a fair record of all the votes and proceedings of the meetings," and, as no money can be raised, but "in a legal meeting, appointed and notified as required," the very notice, by the officer of the district, being *directly* necessary to the legality, and generally referred to in the acts of the meeting, becomes necessarily a part of the votes and proceedings; and a contrary doctrine would be very pernicious.

The defendant also attempted to introduce parol testimony of the attendance and voting of all the legal voters. This is evidently founded on the authority of *Rez v. Theodorick*, 8 East 86; but even there it appears there was an unanimous agreement to waive notice, and it was clearly admitted, that, if the charter required a special notice, it could not be dispensed with, even by unanimous consent. Ang. & Am. on Corp. 278, § 5; *Stowe v. Wyse*, 7 Conn. 214. These, however, are cases of purely private corporations; but in public and quasi corporations, like the present, the rule is much more strict; for by votes, taxes, and land titles dependent thereon, they affect, not only the corporators, but other persons, not voters, or residents, in the district, but having estate therein.

The opinion of the court was delivered by

HEBARD, J. In this case two questions have been presented. The first is, whether the defendant can show by parol the time of the day at which the district meeting was warned to be holden,—which is omitted in the record of the warning. The other is, whether the defendant can show by parol, that all the legal voters in the district were present at the meeting, and voted on the question of raising the tax, for payment of which the oxen were taken.

The first question depends mainly upon the question whether the

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warning is to be regarded as a part of the proceedings, which are required, by law, to be recorded. This must depend mainly upon its connection with the business, that is done under it. It is not made necessary by any express provision of the statute, as in the case of warnings for town meetings. The statute was undoubtedly intended to provide for such a record of the proceedings of the district, as would render it unnecessary to have any thing supplied by parol, in order to determine the legality of the proceedings. The statute requires notice to be given by a warning; and all the business to be transacted must be set forth in the warning. Unless the warning is recorded, there is no way of ascertaining whether the proceedings were legal;—and this, undoubtedly, should be the state and condition of the records. They should furnish all the means for testing the validity of the proceedings. With this view, it would seem to follow that no omission in the record of the *warning* could be supplied by parol.

The main question was settled by this court at their last session in this county. It was then considered that the time of day, at which the meeting was to be held, was an essential part of the notice, and that it could not be dispensed with.

It is next insisted, that the offer to prove that all the legal voters of the district were together at the meeting and voted should have been allowed. But this is substantially the same question, in principle, that we have just disposed of. The objection is to the mode of proof. Any fact, that should be a matter of record, should be proved by the record. That all the voters in the district were present is not necessary, in order to make the proceedings legal; nor can such fact be gathered from the record. To allow parol proof of that fact, as a substitute for a fact that should appear from the record, would be substituting *parol proof* for the *record*.

It is to be noticed, that all the powers, which the district have, for raising money and collecting taxes, are given by the provisions of the statute, and that the district can only exercise these powers by following the provisions of the statute. And it is also to be noticed, that the *powers*, with which the district is thus vested, are to affect *non-residents*, and others, who are not voters. To permit the district to exercise this authority, without complying with the pro-

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visions of the statute, would be sanctioning the collection of taxes, without the consent of those who are taxed, and against law.

The case of *The King v. Theoderick*, 8 East 543, has been cited as an authority by the defendant. But that case and the one now before the court cease to appear *parallel*, when we examine the provisions of the charters of the respective bodies. In the case from East the charter required no special summons to the *electors*, for the purpose of holding the election. In the case of school districts the statute does require a special *summons* or *notice*, to be given to the voters, and specifies the length of the notice and the manner of giving it. And in the case cited, Lord Ellenborough says, "If a summons of any kind had been specially required by the charter, a compliance therewith would have been strictly necessary, in order to have rendered the election valid." We therefore think this an authority which *favours*, rather than opposes, the ruling of the county court.

The subject of imposing taxes has always been scrutinized and narrowly watched; and a strict and rigid compliance with the law has been required, to make the taxes legal. The case of an *election* has usually been construed more liberally,—the powers exercised depriving no individual of his property, or of any legal right. But in the collection of taxes it is otherwise. Money is thereby taken from the pockets of individuals, who have no right to participate in the proceedings, and who, perhaps, have no interest in the design and purpose, for which the tax is raised; and, while they may be compelled to part with their money without their consent, they at least have a right to insist that it shall be *according to law*.

The judgment of the county court is affirmed.



JOSEPH S. FRENCH v. JESSE WILKINS.

In the case of a writ of review, which it is provided by statute may be brought within three years "next after the rendition" of the judgment to be affected by it, the day on which the original judgment was rendered is to be excluded, in the computation of the three years.

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WRIT OF REVIEW, brought under the provisions of chapter 26, section 28, of the Revised Statutes.* The defendant pleaded that the cause of action did not accrue to the plaintiff within three years next before the commencement of this suit. It appeared that the judgment in the original suit, which the plaintiff now sought to vacate by his writ of review, was rendered on the ninth day of May, 1840, and this writ of review was sued out on the ninth day of May, 1843.

The county court decided that the suit was not barred, and rendered judgment for the plaintiff; to which decision the defendant excepted.

Keyes & Tyler for defendant.

I. When a thing is to be done in a specified time after a particular fact, the day of the fact is to be reckoned as inclusive. 2 Stark. Ev. 782. Com. Dig., *Temps A.* 4 Kent 95. 2 Bl. Com. 112, (140.) *Presbrey v. Williams*, 15 Mass. 193. *Priest v. Tarleton*, 3 N. H. Rep. 93. Owen on Bankr. 154. Rev. St. 172, § 28. Ib. 53, § 9.

II. The exceptions to this rule are,

1. When an act is to be done from and after a day named, the day is not included. *Bigelow v. Willson*, 1 Pick. 485. *Wiggin v. Peters et al.*, 1 Metc. 127.

2. When it appears to be the intention of the parties, that the day *a quo* should not be included,—as in the cases of leases for twenty one years.

3. When a penalty, or forfeiture, is to be avoided, the law will construe the time liberally. *Lester v. Garland*, 15 Ves. 248.

III. In construing statutes of limitation of action, the day *a quo* is always included;—no authorities have been found to the contrary. See authorities *ub. sup.* *Price v. Hundred of Chewton*, 1 P. Wms. 437. *Norris v. Hundred of Gawtry*, cited in 2 Stark. Ev. 679.

*Which section is in these words,—“The writ of review, mentioned in the preceding section, may be commenced before the same justice, who rendered judgment in the original suit, if he be in office, in the same county, or, if not in office in the same county, before any other justice, within three years next after the rendition of said judgment, and served in the same manner as other justice writs.”

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IV. The law does not notice parts of a day, in the computation of time. See authorities *ab. sup.* *In re Welman*, Law Reporter, May 1844, p. 25.

Bradley & Walker for plaintiff.

The question in this case is, in computing the three years, allowed for bringing the writ of review, is the day of the rendition of the judgment to be included, or excluded?

The question, whether, when time is to be computed *from an act done*, the day of the act is to be excluded, or included, has long been unsettled in the English courts, and their decisions have been adapted to a *sliding scale*. The decisions, principally relied upon in favor of inclusion, are *Norris v. Hundred of Gautry*, Hob. 139, *King v. Adderley*, Dougl. 463, and *Castle v. Burditt*, 3 T. R. 623. The case in Hobart was an action against a hundred, by one who had suffered robbery within its precinct,—and it was held, that, in computing the year, within which the plaintiff was allowed to bring his action, the day of the robbery was to be *included*. This was a *penal proceeding*. The case in Douglass was an action against a late sheriff, for not returning a process, the statute having provided that he should not be liable, unless he was required to return, &c., within six months from his leaving office; and it was held, that, in counting the six months, the day of his leaving office was to be included; but Lord Mansfield says it was against his first opinion, and gives, as a reason for a change of opinion, that it was a *penal proceeding*, and that the defendant was entitled to the most favorable construction of the statute, especially as it professed to be *for the ease of sheriffs*. *Castle v. Burditt* was an action of trespass against a custom house officer. It was provided by statute that one month's notice should be given, before commencing the action; and it was held that the day of the service of the notice was to be *included*, in computing the month. This decision is expressly based upon that in Douglass, yet it is without any of those peculiar reasons, that led to that decision.

The question of computing time again came up in *Lester v. Garland*, 15 Ves. 248, which was ably argued, and fully considered, and all the prior cases were examined. It was a case of bequest,

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upon a condition that a certain security be given within six calendar months from the decease of the testator. The testator died Jan. 12, 1805, and the security was given July 12, 1805; and it was held to be in time. The Master of the Rolls, in that case, refers to the case of *Mercer v. Ogilvie*, decided in the House of Lords, where it was held, that, in ascertaining whether a grantor lived sixty days after the making and granting a certain deed, the day, on which the deed was made and granted, was to be *excluded*. In *Pelton v. Hundred of Wymond*, 9 B. & C. 134, in an action against the hundred, for damages done to premises maliciously set on fire, it was held that the two days, allowed by statute for giving notice of the offence, were exclusive of the day on which the fire happened. In *Hardy v. Ryle*, 9 B. & C. 603, which was an action for false imprisonment, where the action was required to be brought within six months, and the discharge was on the 14th day of December, and the action was commenced on the 14th of June following, it was held that the action was commenced in time.

The American cases, so far as they have fixed any rule in relation to the computation of time, *exclude* the day of the date, or of the act done, and count from the expiration of that day. In *Henry v. Jones*, 8 Mass. 453, it was held that a note, payable "in sixty days," is payable in so many days from the date, *exclusive of the day of the date*. And see *Rand v. Rand*, 4 N. H. Rep. 267; 2 Conn. 69. In *Portland Bank v. Maine Bank*, 11 Mass. 205, it was held, that, in computing the thirty days after judgment, during which property attached on mesne process is held, the day on which judgment was rendered is to be excluded. The case of *Bigelow v. Willson*, 1 Pick. 485, involved the question of the time, within which redemption might be made of property sold on execution. The land was sold, and the sheriff's deed was made and delivered Nov. 6, 1820; the statute provided that land might be redeemed "within one year next after the executing, by the officer to the purchaser, of the deed thereof." The tender was made Nov. 6, 1821; and it was held to be in season, and that, in making the computation, the day of the date, or act, should be excluded. *Windsor v. China*, 4 Greenl. 296, where it was necessary for the defendants to show that they objected to the plaintiff's notice "within two months

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after such notice," and the notice was given Oct. 20, 1823, and the answer was received Dec. 20, 1823, it was held that the day of giving the notice was to be *excluded*, and that the answer was in time. In *Wing v. Davis et al.*, 7 Greenl. 31, it was decided, "that, in computing the three years after entry for condition broken, within which a mortgagor may redeem, the day of such entry is to be *excluded*. In *Blake v. Crowninshield*, 9 N. H. Rep. 304, in a contract for a sale of lands, the plaintiff was to have three months to satisfy himself and select lands. The contract was dated April 8, 1835; the election was made and notified to the defendants July 8, 1835; and it was decided to be in time. The court say, "The tendency of the recent decisions undoubtedly is, to exclude the day of the act, unless, to save a forfeiture, or for some other special reason, it becomes necessary to reckon it inclusive."

Snyder v. Warren, 2 Cow, 518, was a case of lands sold at public sale, Aug. 15, 1822. The statute allowed redemption "within fifteen months after such sale" by a creditor. An offer to redeem was made Nov. 15, 1823; and the court say, that the party "had the whole of the 15th of Nov. on which to redeem." *Ex parte Dean*, 2 Cow. 605, was a motion for a mandamus to quash an appeal, because not taken in time. The statute allowed an appeal at the time of rendering judgment, or within four days thereafter. The judgment was rendered Sept. 12; the appeal was taken Sept. 16; and it was held to be in time. This case is very analogous to the one under consideration. The case of *Sims v. Hampton*, 1 Serg. & R. 411, was upon an appeal from the decision of arbitrators. The statute authorized an appeal "within twenty days after the entry of the award on the docket." The entry was made Aug. 2; the appeal was taken Aug. 22, and was held, by Ch. J. Tilghman, to be *in time*. He cites 1 Crompt. Pr. 46 and Sellon 102, to show, that, under St. 5 Geo. II, c. 27, which requires that an appearance be entered "within eight days after the return of process," the day of the return is *excluded*. And in *Brown v. Brown*, 3 Serg. & R. 496, the same point was decided in the same way. The statute authorized an appeal from an alderman "within twenty days after judgment being given;" the judgment was rendered March 1st; the appeal was entered March 21st, and was holden to be in time.

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The terms of the statute, on which this writ of review is founded, are precisely similar to those of the several statutes construed in the three last cases above cited.

The opinion of the court was delivered by

HEBARD, J. This was a writ of review, brought by the defendant in the original suit, under the provisions of the statute. The statute provides, that, in the cases there specified, the writ of review may be commenced "within three years next after the rendition of the judgment," &c. In this case the judgment was rendered on the ninth day of May, 1840, and the writ of review was brought on the ninth day of May, 1843. The only question in the case, for this court, is, whether the writ of review was commenced within three years next after the rendition of the judgment in the original suit.

This question cannot be settled entirely by authority; the *decisions* upon the point have been made under circumstances in some measure peculiar to themselves,—and in some of the cases the reasons for holding one way, or the other, were derived from the equity, or the hardship, of the particular case. Indeed, it is a little difficult to adopt any reasoning upon the subject, that is not open to some objection. The mode of computing, that has been adopted under the various provisions of our statutes, ought, perhaps, to be some guide in this case. In the service of writs, the day of service is excluded, when determining the legality of the notice. In computing the period that an execution has life, the day of rendering the judgment, upon which it issued, is excluded;—and so in fixing the time, within which the execution must be put into the hands of the officer, in order to preserve the lien created by the attachment of property, or to hold bail. The expression of the statute, in these cases, is, "from the time of rendering final judgment." The words, "*from the time of rendering*," and "*next after the rendition*," equally exclude the day of the judgment. This construction, which our statute has received in the cases referred to, would require that the same construction should be carried out in other similar cases.

It is a common maxim, that, in law, there is no fraction of a day; and, by applying that maxim, the whole question is settled. The

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time of rendering is made to mean the *day* of rendering; and when the time of rendering the judgment is thus made co-extensive with the day of rendering the judgment, the time cannot, legally, begin to run, until the day after the judgment is rendered.

The distinction, taken in the cases cited by the counsel for the defendant, is entirely forced,—unless in cases, where the phraseology of the statute, or writing, was such as to forbid any other conclusion. “*From a time*” and “*from and after a time*” are expressions used indiscriminately, and for the purpose of expressing the same idea. And the conflicting rules, that have been referred to, apparently grew out of a specious distinction, taken in cases where the court felt a strong desire, in the one case, and the other, to reach the *equity* of the case, and, for that purpose, made the *rule bend to the case*, instead of making the *case bend to the rule*. But, by adopting the principle, that there is, in law, no fraction of a day, we have a starting point, and a rule that admits of a general application.

The authorities cited by the plaintiff’s counsel are too numerous to be reviewed at this time. But, if the question was to be decided upon the weight of authority, without regard to the practical construction which has been given to similar provisions of our statutes, we should feel compelled to yield to those authorities, which exclude the day, on which the act was done, in computing the period of time after such act.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR.
FEBRUARY TERM, 1845.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, }
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. WILLIAM HEBARD, }

THOMAS S. GORDON V. WILLIAM POTTER.

One who trades with an infant, and gives credit to him alone, knowing all the facts in the case, can never, after that, sustain an action against the father of the infant for the articles thus delivered.

A parent is not liable for necessaries furnished to his minor child, unless they are furnished by his authority, express, or implied.

Where the defendant permitted his minor son to go out to work by the month, and the plaintiff delivered to the son certain cloth and trimmings, for articles of necessary clothing, knowing the circumstances, and it did not appear that the father ever expressly authorized the delivery of the articles to the son, it was held that the plaintiff could not recover for them of the father, notwithstanding it appeared that the father knew that the son had purchased the articles, and that he gave the son money to help make up the cloth, and permitted him to wear out the clothes, when made.

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Notwithstanding judgment to account is rendered against the defendant, in an action on book account, by default, yet, if it appears from the auditor's report, that there is nothing due from the defendant to the plaintiff to balance book accounts between them, judgment upon the report will be rendered in favor of the defendant, for his costs. *Samb.*

BOOK ACCOUNT. Judgment was rendered against the defendant by default, and an auditor was appointed, who reported, in substance, as follows.

The plaintiff presented an account against the defendant for cloth and trimmings for a suit of clothes, delivered by him, in June, 1841, to Augustus Potter, the minor son of the defendant. At the time of the sale the son was at work by the month for one Russell, in Shrewsbury, by permission of the defendant,—who resided in Plymouth. The plaintiff, before the sale, knew where the defendant resided, and was informed by Russell that he was to furnish the son with some clothing, when the time was out for which he was to work, which would be the first of October following, and that, if he, plaintiff, sold the clothing to the son, he could not pay him for them before the first of October. It appeared that the defendant told his son, in the spring, to go out to work, and that in the fall he would get him some winter clothes; and it did not appear that he refused to get the clothes for his son, but that he neglected to do so. It farther appeared that the defendant knew of the purchase made of the plaintiff by the son, and that he furnished to the son one dollar in money, with which to pay for making up the clothes, and gave him a part of his earnings, and that he permitted the son to wear out the clothes.

The county court rendered judgment for the defendant, upon the report; to which decision the plaintiff excepted.

S. Fullam for plaintiff.

1. A father is bound to provide for and support his minor children; and if he neglect to do so, and another furnish them, he is bound to pay for the necessities furnished. 1 Sw. Dig. 41. *Van Valkenburgh v. Watson*, 13 Johns. 480. So if he know of the purchase, acquiesce in it, and receive the benefit of it, it is a sufficient consideration for a promise to pay, and the law implies the prom-

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ise. It is the duty of a father to know how his son came by cloth, which he furnishes the means of making into clothes.

2. The Defendant was defaulted in the County Court, and we insist we are entitled to nominal damages, at least.

T. Hutchinson for defendant.

There is no pretence that any credit was given to the defendant at the time of the sale; but all was on the credit of the son. See *Rolfe v. Abbott*, 6 C. & P. 286, [25 E. C. L. 400;] 1 C. & P. 25, [11 E. C. L. 295.]

The opinion of the court was delivered by

REDFIELD, J. This case presents the question, how far a parent is liable for necessities furnished to his minor child. The report of the auditor, which is the basis of the judgment below, which we are now revising, seems to leave the case defective in many particulars, as against the father. It does not appear, except by way of inference, that the articles charged were furnished upon the credit of the father, or, in other words, that the plaintiff, at the time they were delivered to the son, expected the father to pay for them. And I take it to be well settled law, that, if one trades with the son, and gives credit to him alone, knowing all the facts in the case, he can never, after that, sustain an action against the father for articles thus delivered. And this is upon the ground, that, if one trade with the agent, and give credit to him personally, knowing of his agency, the principal is not liable.

But there is one defect in the case, which we think must clearly, and indisputably, preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly, or by implication, to pledge his credit for the articles; but the contrary. And unless the father can be made liable for necessities, for his infant child, against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of judges, or of elementary writers, which seem to justify the conclusion, that the parent may be made liable for necessities for his child, even against his own will. But an examination of all the cases upon this subject will not justify any such conclusion. Chancellor Kent (2 Com. 191,) says, "During the minor-

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ity of the child the parent is absolutely bound to provide reasonably for its maintenance and education, and he may be sued for necessities furnished, and schooling given to a child, under just and reasonable circumstances." Ch. J. Swift (1 Dig. 41,) uses much the same language. None of the cases referred to by these writers justify the language used. *Van Valkenburgh v. Watson* (13 Johns. 480,) is relied upon by both these writers to sustain their position. But the decision in that case was in favor of the father. The court say, indeed, that, had he absolutely refused to furnish necessities to his minor child, he might be made liable for them, when furnished by a stranger. But the decision involved no such question, and called for no such declaration. Chancellor Kent refers to *Stanton v. Wilson*, (3 Day 37,) which, although a Connecticut case, is not adverted to by Ch. J. Swift; from which we conclude he did not esteem it in point. The rule laid down in this last case is broad enough to make the father liable, against his will. "When an infant child elopes (?) from his father for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education, furnished to such child by a stranger." But the case before the court was, where the necessities had been furnished to the child by consent of the legally constituted guardian, the mother, after a divorce *a vinculo*. Chancellor Kent also refers to *Simpson v. Robertson*, (1 Esp. Cas. 17.) But this case merely decides, that the father is not liable for articles of clothing furnished to the son by a tailor, "who colludes with the son, and furnishes him with clothing to an extravagant degree." *Ford v. Fothergill* (Ib. 211) is also referred to by Chancellor Kent. But this was a case *against the son*, and the only question moved in the case was, as to the extent of the liability of an infant for necessities. *Stone v. Carr* (3 Esp. Cas. 1,) is likewise referred to by Chancellor Kent. This case only determines the extent of one's liability for necessities furnished to his wife's children, by a former husband, when they form a portion of his family. No other authorities are referred to, and it is presumed none other exist, or they would not have been overlooked by such an indefatigable reviser as the learned Chancellor, whose opinions are, in our American courts, deemed law, and are sought with almost equal avidity by the proprietors of railroads, and by the impeachers of presidents. But, notwith-

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standing the usual accuracy of the learned commentators referred to, it needs no farther argument to show, that their opinion, on this point, is without the support of any decided case.

An examination of the English cases, upon this point, will show, that the parent cannot be made liable for necessaries, furnished to his child, without his consent, either express, or implied. The case of *Bainbridge v. Pickering* (2 W. Black. 1325,) is the same, almost, as that already quoted from 13 Johns. 480. But the opinion of the court shows more the sense of the English courts upon the important matter of family government. Guild, J., says, "No man shall take upon him to dictate to a parent, what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father and mother." In the case of *Baker v. Keen*, 3 Eng. C. L. 449, [2 Stark. R. 501,] which was tried before the late Lord Tenterden, then Ch. J. Abbott, it was held, that, when a minor "orders articles, which are necessary to his condition in life, it is a question for the jury, under all the circumstances in the case, whether they can infer an authority given to that effect by the father." The Lord Chief Justice says, "A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied." In *Hack v. Tollemache*, 11 Eng. C. L. 296, [1 Car. & P. 5,] it is held, that a "father is not bound to pay for clothing furnished to his son, without some contract, express, or implied, on his part, to do so." Borough, J., says, "An action can only be maintained against a person for clothes, supplied to his son, either when he has ordered such clothes, and contracted to pay for them, or when they have been at first supplied without his knowledge, and he has adopted the contract afterwards." *Rolfe v. Abbott* is to the same point; 25 Eng. C. L. 400, [6 Car. & P. 286.] Baron Gurney told the jury, that, "to charge the father, it is essential that the goods should have been supplied with his assent, or by his authority." In *Law v. Wilkin*, 33 Eng. C. L. 193, [6 Adol. & El. 718] the same rule is confirmed, although a new trial is there granted, upon the ground that the case should have been submitted to the jury. From which we conclude such is the acknowledged rule of law in Westminster Hall, or so many of the judges would not be found so unanimous in declaring

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it. And it is obvious, that it makes no provision for strangers to furnish children with necessaries, against the will of parents, even in extreme cases. For if it can be done in extreme cases, it can in every case, where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessaries, suitable to the varying taste of the times. There is no stopping-place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by statute, compel a proper maintenance. But this, according to the English common law, which prevails in this state, is not the right of every intermeddling stranger.

The following English cases serve to show still more clearly, the opinion entertained there upon this subject, than the earlier cases. *Blackburn v. Machev*, 1 Car. & P. 1, [11 Eng. C. L. 295,] decides that "a father is not liable for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied." The proof in that case was, that the son was in want of clothes, and his father did not furnish him with any, or with money, and he obtained them of the plaintiff. Abbott, Ch. J., says, "The question deeply affects society; for if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man, who had a family, might be ruined. A father is not bound to pay for articles ordered by his son, unless the father gives some authority, express, or implied." In *Seaborne v. Maddy*, 9 Car. & P. 497, [38 Eng. Com. L. 194,] it is decided, that "no one is bound to pay another for maintaining his children, unless he has entered into some contract to do so. Every man is to maintain his own children, as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action." This was as late as 1840, before Mr. Baron Parke. In a note to this case, I find a report of the case of *Mortimore v. Wright*, from the London Law Journal, vol. 9, Excheq., p. 158, in which it was decided, in the exchequer chamber, upon writ of error, that a father is not liable for debts incurred by his son, while under age, unless he has given an authority to the son to incur them, or has contracted to pay them; and that the moral obligation he is under to support his children infers no such liability. In that case

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Lord Abinger, Ch. B., said, "In point of law, a father, who gives no authority and enters into no contract, is not liable for goods supplied to his son, any more than an uncle, a brother, or a stranger, would be. The mere moral obligation upon a father to maintain his child (which I by no means deny,) affords no inference of a promise to do so. In order to bind a father for a debt incurred by his son, you must prove, that he has contracted to be bound, in the same manner you would prove such a contract against any other person; and it ought not to be left to juries to make the law in each particular case, according to their own feelings or prejudices." Baron Parke says, "It is a clear principle, that a father is not under any legal obligation to pay his son's debts, unless he has contracted so to do, except, perhaps, under the 43 Eliz., under which he may, under certain circumstances, be compelled to support his children according to his ability. A mere moral obligation can impose upon him no such legal liability."

In this case all the former cases are elaborately reviewed, and many of them limited and qualified, and the foregoing may be considered the settled law in Westminster Hall, so late as 1840. It need not be remarked how precisely it corresponds with the view we had taken of what the law was, and what it should be. The laws are made and administered by young men far more in this country than in England, but it is to be hoped that will not induce us to depart from so salutary a rule of law, as that giving the father the control of his own household and property. There is full enough disposition of late to subject fathers to the caprices, or the excesses and extravagance, if not the domination, of thoughtless and heartless sons, in concurrence with others, who subsist by deluding and destroying sons, who might otherwise be sober and decent. One could hardly desire to see the tendencies in that direction increased. A father, who supports his family, ought, it would seem, to be consulted as to the mode in which it shall be done; and, if he will not support them, "being of ability," the statute points out the remedy, the same in this state as in England. I know the law is different as to the wife, and there are substantial reasons why it should be. She may always buy necessities on her husband's credit, if he turn her off, without her fault, or refuse to find her a suitable maintenance at home.

Judgment affirmed.

Winn v. Southgate.

THALES B. WINN v. PORTER B. SOUTHGATE.

If one contract to labor for another for a specified term, and leave the service of his employer, before the expiration of the term, without any cause, attributable either to the employer, or to the act of providence, he cannot recover any compensation for the portion of the term during which he in fact labors.

And it makes no difference that the employer, before the expiration of the term, permitted the plaintiff to be absent from his employment for a few weeks upon a journey,—the plaintiff having, after his return, again resumed labor for his employer, under the contract.

Nor does it make any difference, that the plaintiff ceased laboring for his employer, under the belief, that, according to the legal method of computing time, under similar contracts, he had continued laboring as long as could be required of him.

Nor that the employer, during the term, has from time to time made payments to the plaintiff for his labor.

And if, in such case the defendant have made payments to the plaintiff upon the contract, during the term, and the plaintiff, having commenced an action of book account to recover for his services, is defeated, upon the ground that he left the service of the defendant, without legal cause, before the expiration of the term, the defendant can have no recovery against the plaintiff for the amount of payments thus made.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported, in substance, as follows.

The main charge in the plaintiff's account was for labor for the defendant for one hundred and thirty one days and a half. The defendant's account consisted of charges of payments made by him to the plaintiff, for the labor, from time to time, while the plaintiff was performing the labor. It appeared that the plaintiff was a journeyman tailor, and the defendant was a merchant tailor. In May, 1841, the defendant entered into a contract with the plaintiff, by which he was to labor for the defendant six months, at \$26 a month. Winn's business was to be the pressing of the work done by the girls, and to show them about their work, when required. The plaintiff commenced work, under the contract, May 17, 1841. In September, 1841, the plaintiff wished to take a journey to Boston, and the defendant consented that he might go. Accordingly the

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plaintiff left, on the 19th of September, and resumed his work in the shop on the 5th day of October, and continued to work until the 30th of October, which was Saturday. The next day, which was Sunday, he told the defendant that his time was out, and that he should not work for him any more. The defendant told him he was not aware that his time was out, and asked him if he could not stay longer. The plaintiff had understood that another journeyman tailor, in the same village, in a settlement with a master tailor, had claimed, and had been allowed to reckon, *twenty four working days as a month*; and it was upon this principle that he reckoned his labor for the defendant at six months, not deducting the time, during which he had been absent upon his journey,—concerning the reckoning, or deducting, of which, nothing was said, by the parties, either at the time of making the contract, or afterwards. On Monday, November 1st, the plaintiff called upon the defendant for a settlement; but the defendant refused, saying that he should not settle with him, until his time was out; and the plaintiff thereupon consulted an attorney, who advised him to return to his labor, and work until the defendant should *agree* that his time was out. On the morning of Tuesday, November 2d, the plaintiff went to the shop, to resume his work, and commenced before breakfast;—but it did not appear that he notified the defendant of his change of purpose, and intention to remain, and the defendant made arrangements for other help in his shop. After breakfast one of the girls in the shop applied to the plaintiff for some directions respecting her work, which the plaintiff refused to give, but referred her to another journeyman in the shop, saying, “all the difficulty in the shop has been laid to me.” This refusal was reported to the defendant by the foreman of the shop, and thereupon another journeyman was directed, by the defendant, to take charge of the pressing-jack, at which the plaintiff had usually worked. On being informed of this arrangement the plaintiff went into the lower shop, and inquired of the defendant if he wished him to go on and work out his time, and said that he “hoped to get along without a fuss.” The plaintiff told him, that he “had left him (plaintiff) once, and he might take his own course.” The plaintiff did not again go to work in the shop.

The county court rendered judgment, upon this report, for the

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defendant, to recover his costs; to which decision the plaintiff excepted.

E. Hutchinson for plaintiff.

1. Although the contract was in *terms* a hiring for six months, and the plaintiff undertook to perform the whole term,—still, we submit, whether, from the conduct of the parties under the contract, as reported by the auditor, a strict and technical performance to the letter ever entered into the minds of the parties, as constituting a *condition precedent* to any right in the plaintiff to demand payment. It was not so *expressed*, as in *Fenton v. Clark*, 11 Vt. 557, and the auditor has not found the fact of such understanding; and the defendant's conduct, to say the least of it, was extremely inconsistent with the idea that *he* so regarded it,—to wit, his consent to the plaintiff's journey below during the six months, as well as the payments, charged in his account, made from time to time from the very commencement of the service.

2. But, treating it as strictly a case of *condition precedent*, the defence cannot prevail, unless the facts reported show, that the plaintiff, whilst the condition was in full force, “*voluntarily and without cause abandoned the contract.*” *Brown v. Kimball*, 12 Vt. 617. If he left the defendant's service, under the honest *belief* that the contract was fulfilled, although it should afterwards be decided, upon a balance of testimony, that it was not, it was no abandonment of the contract, within the principle of the decided cases.

And in this case the leaving was not “without cause;” but an excuse is found by the auditor, showing it to have been owing solely to an innocent mistake of the plaintiff in the mode of computation; he having reckoned the time by *lunar* instead of *calendar* months, as the auditor finds he had been informed was practiced in the vicinity.

3. Again, the plaintiff was discharged from the condition, (if it were such,) by the defendant's consenting to the plaintiff's journey to Boston during the stipulated term;—thereby rendering a technical performance impossible. And the condition, having been once released, can never be renewed, as a ground of forfeiture, without some new agreement to that effect. *Fenton v. Clark*, 11 Vt. 563. So are the old authorities. 1 Rol. 471 l. 47, 50, 52. 3 Com. Dig. 132.

Winn v. Southgate.

Tracy & Converse for defendant.

The plaintiff is not entitled to recover for his labor. *Steam Boat Co. v. Wilkins*, 8 Vt. 54. *Jennings v. Camp*, 13 Johns. 94. *Faxon v. Mansfield*, 2 Mass. 147. *Sutton v. Tyrrell*, 12 Vt. 79. *Ripley v. Chipman*, 13 Vt. 268. 4 Greenl. 454. 14 Mass. 266. 14 Johns. 484. 2 Pick. 267. He cannot avoid the effect of the rule of law, by saying that he acted in good faith, since he was bound to know the law; and it is the *law of the land*, and not the party's *mistaken notions* of his duty, which furnishes the rule on which cases are to be decided in courts of justice. The permission given by the defendant to the plaintiff to take the journey to Boston could not abrogate the original contract for labor, and entitle the plaintiff to recover pay for whatever time he labored, unless it was so agreed. No such agreement was proved, or pretended; but the facts show most conclusively that neither party so understood it.

The defendant was under no obligation to receive back the plaintiff, at the time he returned and offered to serve out his time. *Sutton v. Tyrrell*, 12 Vt. 79. *Lantry v. Parks*, 8 Cow. 63. *Spain v. Arnott*, 2 Stark. 256.

The opinion of the court was delivered by

HEARD, J. The only question in this case is, whether the plaintiff, by leaving the employment of the defendant, forfeited any claim for the balance of his account;—for it is only the balance, that is to be affected. If the defendant chose to make payments, before the contract had been fulfilled, he cannot recover them back.

The plaintiff contracted to labor six months. He left, before the time had expired, without any cause, that was *attributable* to the defendant,—nor was it on account of any interposition of providence. It then rests upon the general and fully *recognized* principle, which governed the case of *Ripley v. Chipman* and numerous other cases. We recognize this case as coming within that principle of law; and when we do that, there is nothing necessary to be said farther, as that principle has been so much dwelt upon, in the various cases that have been decided, that the law is now well understood.

Judgment affirmed.

Onion v. Fullerton.

ALFRED ONION v. NATHANIEL FULLERTON.

When the testimony offered and admitted in the court below was objected to, and the question presented upon the bill of exceptions is whether the testimony tended to support the declaration, the supreme court will not examine into the sufficiency of the declaration, but will affirm the judgment, if the testimony was pertinent to the issue.

A declaration in account, which alleges that the defendant was bailiff of the plaintiff of certain property, and which shows that the parties were joint tenants of the property, is sustained by evidence tending to show a joint ownership of the property, and that the defendant has received more than his share of the avails of the property; and this evidence, upon the issue whether the defendant was bailiff and receiver, will entitle the plaintiff to a verdict.

ACCOUNT. It was alleged in the declaration that the defendant, from the first day of January, 1835, to the first day of January, 1839, was the bailiff of the plaintiff, and had the care, &c., of a large amount of property belonging to the plaintiff and defendant, to use, improve, and dispose of for the common benefit of the plaintiff and defendant, and to render a reasonable account therefor to the plaintiff, and that the defendant, during the said time, received divers large sums of money to make profit thereof for the use of the plaintiff and defendant, and thereof to render a reasonable account to the plaintiff, upon demand; and that the defendant, though requested, had never rendered any account to the plaintiff. The defendant pleaded that he was never bailiff or receiver, as alleged in the declaration, and upon this plea issue was joined, which was tried by the jury.

On the trial the plaintiff proved that one Clark was the owner of certain stage coaches, horses, &c., and run a stage on the mail route from Chester to Rutland, and that, becoming embarrassed in his pecuniary affairs, he put the property into the hands of these parties, under a contract, by which they were to hold the property, and run the stage, and carry on the business in their own names, and, when opportunity occurred, to sell the same, and, after paying themselves from the receipts and avails for all they had paid out in the business, to pay over the balance to Clark; that these parties did take the property, and run the stage for a time, and then sold the

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property ; and that the plaintiff paid out several hundred dollars more than he received, and more than the defendant paid out, and that the defendant received several hundred dollars more than he paid out.

The court directed the jury, that, upon these facts, the plaintiff was entitled to a verdict ; to which decision the defendant excepted. Exceptions were also taken, by the defendant, to the report of the auditors appointed in the case, which exceptions were subsequently waived.

D. Kellogg and L. Adams for defendant.

The declaration is *svi generis*. Neither the relation of joint tenants, tenants in common, or copartners, is alleged ; and yet some kind of mutual or joint interest in the property would seem to be intended. It cannot be regarded as an action upon the statute, as some material allegations are wanting. *Brinsmaid v. Mayo*, 9 Vt. 31. It can only be regarded as an action at common law, and to be supported (if at all,) on common law principles ; and if so, we say the evidence, for that purpose, was wholly insufficient ; 3 Hill 59 ; *Wilkins v. Burton*, 5 Vt. 76.

If the transactions between Clark and these parties shall be viewed as legal, then it appears that the plaintiff and defendant were the *joint bailiffs* of Clark, and liable to account to him. And it is insisted that one joint bailiff, or agent, cannot sustain account against his co-bailiff ; 1 Bac. Ab. 17. (A.) 13 Vt. 517.

No contract, whatever, was shown between these parties, in relation to the property, in respect of which an account is claimed ; and, as this action is always founded on a privity of contract, or estate, and will not lie against a wrong doer, it follows that the proof is not sufficient ; 9 Vt. 31.

N. Richardson for plaintiff.

1. It appears, from the case stated in the bill of exceptions, that the plaintiff and defendant held the property as tenants in common, and that the defendant had received several hundred dollars more of the avails, than the plaintiff ; and hence the action of account well lies to adjust the difference. 1 Swift's Dig. 580-582. *Albee v. Fairbanks*, 10 Vt. 314. 1 Binn. 191. 2 Caine 293. 12 Johns. 402. 3 Day 377. 7 Conn. 95, 35 E. C. L. 114.

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2. They received the property jointly, and were jointly liable to Clark, and whatever sums either of them paid, or received, were for their joint benefit; and no doubt it was good accounting, before the auditors, for the defendant to show that he had paid the avails to Clark, after the plaintiff had received the full amount of his disbursements, but not before.

The opinion of the court was delivered by

WILLIAMS, Ch. J. In this case the exceptions to the report of the auditors are waived. The only question, which remains, is as to the exceptions taken at the trial. There is no demurrer to the declaration, and no motion in arrest, and our inquiry must be, whether the proof supports the declaration;—and, in our opinion, it does.

In the declaration it is stated that the defendant was bailiff of the plaintiff of certain property; but it is farther to be learned from the declaration, that the parties were tenants in common of the property mentioned; and it is very similar to a form given in *Wentworth's Pleadings*. The evidence tended to show the joint ownership, and that the defendant had received more than he paid, and more than his share; and, on the issue formed, this, we think, entitled the plaintiff to a verdict, as it proved directly the allegations in the declaration.

Whether the declaration would have been good, if demurred to, we are not called on to say. The county court would not have been justified in testing the sufficiency of the declaration, on the trial of the issue formed. The judgment of the county court is therefore affirmed.



WILLIAM ADAMS v. JACOB FOX.

One who has executed a receipt to an attaching officer, for property attached, thereby promising to deliver the property to the officer upon demand, may show, in defence of an action against him upon the receipt, that the property receipted was, at the time of the attachment, his property, and not liable to the attachment, and that he then so informed the officer; and such showing will entitle him to judgment in his favor.

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ASSUMPSIT upon a receipt for property attached. Plea, the general issue, and trial by the court.

On trial the plaintiff gave in evidence the receipt declared upon, executed by the defendant, by which he acknowledged that he had received of the plaintiff, a deputy sheriff, one hundred and twenty five sheep's pelts, worth one hundred dollars, which the plaintiff had attached as the property of Andrew Backus, upon several writs of attachment against him, describing them, which property the defendant therein promised to "deliver to said Adams, or his order, on demand, free from expense." The plaintiff also proved the other facts, necessary to support his declaration.

The defendant then offered to show that the property named in the receipt belonged to him, at the time the attachment was made, and that he then so informed the plaintiff. To the admission of this testimony the plaintiff objected; but the court overruled the objection, and received the testimony, and rendered judgment for the defendant. Exceptions by plaintiff.

A. P. Hunton for plaintiff.

The contract was made by competent parties, and is lawful. If it is founded upon sufficient consideration, the evidence offered by the defendant was improperly admitted. An officer has a special property in goods lawfully attached by him, and a right of possession. *Bigelow's Dig.* 110, § 10. *Ladd v. North*, 2 Mass. 514. *Whittier v. Smith et al.*, 11 Mass. 211. *Johnson v. Edson*, 2 Aik. 299. Any act, by which the defendant has benefit, is a sufficient consideration for a promise,—as the delivery of certain goods, in which the plaintiff had only a special property; for the defendant had a benefit by the present possession. *Cro. Eliz.* 218. *Yelv.* 450, cited in 1 Com. on Cont. 12. Any forbearance of a right is a foundation for an undertaking. *Pillans et al. v. Meirap et al.*, 3 Burr. 1673. The officer had a right to retain the possession of the property, as against the defendant and all the world, whoever might be the real owner of it. *State v. Downer et al.*, 8 Vt. 424. This right he forebore, at the defendant's request.

But, if it is considered that the officer had not, strictly, and in justice, a right to the possession, if the property belonged to the defendant, it still stands that he claimed that it was not the defendant's

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property, and the dispute was settled, as the contract shows. *Blake v. Peck*, 11 Vt. 483.

It is sufficient that a slight benefit be conferred by the plaintiff on the defendant. Chit. on Cont. 7. 1 Com. on Cont. 14. 2 Saund. R. 137 c, n. 6. 10 Ves. 292-295. 1 Bridg. Eq. Dig. 359.

The contract in this case is reasonable; the defendant regarded his title to the property as doubtful, and concluded to relinquish his claim to it, by having the privilege of then possessing it.

J. Barrett and *J. S. Marcy* for defendant.

As between the officer and receiptor, the receipt is a contract of indemnity to the officer. *Spencer v. Williams*, 2 Vt. 209; 13 Conn. 521. Its conclusiveness rests on the ground that the officer is liable, upon his return, to have the receipted property to respond final judgment. In this case, having attached the property of Fox, and not of Backus, his return created no liability. If he had given up the property to Fox after attachment, showing that it belonged to Fox would have been a good defence for him. If he had taken the property and sold it, he would have been liable to Fox therefor in trespass. *Merritt v. Miller*, 13 Vt. 416. *State v. Miller*, 12 Vt. 437. *Learned v. Bryant et al.*, 13 Mass. 224.

The receiptor is not *estopped* from showing that the property receipted is his own. 1. In this case he practiced no fraud upon the officer, by silence, or misrepresentation as to the ownership of the property, by which the officer was caused to withhold inquiry or search for other property. 2. The receipt makes no *admission* as to whose the property is, in fact, but only *as whose* it is attached. 3. Nor is the *promise to return* the property conclusive. The receiptor may show, in defence, that the property belonged to another, or that it has perished, without his fault. 13 Conn. 520-522. 13 Mass. 224. *Harvey v. Lane*, 12 Wend. 563. *Edson v. Weston*, 7 Cow. 278.

Moreover, the *consideration* of the *promise* may be inquired into in this case, as well as in an action on a promissory note. What is the consideration of the promise in the receipt? *Not*, as has been sometimes said, the yielding to the receiptor a specific lien and right of possession acquired by the attachment; *Fisher v. Cobb*, 6 Vt. 622; if the property belonged to Fox, the officer had no right to

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the possession, but that right was in Fox alone;—if so, the permitting Fox to keep that possession could be no consideration for the promise to return.

Again, if the receiptor gives up the property to the *real owner*, that fact may be shown by him, and it constitutes a full defence to an action on the receipt. 13 Mass. 12. 12 Wend. 563. 7 Cow. 278. 13 Conn. 520. Story on Bailments 98. Why may not the receiptor as well show that the property is *his own*?

Policy, also, requires that the receiptor be permitted to show the property attached and receipted to be his own, in defence to an action upon the receipt. If he can only show it in *mitigation of damages*, he will be driven to the alternative of losing the possession and use of his property until the failure of the suit on which it was attached, or until the officer sees fit to deliver it up to him, or until he has established his right, by a suit, to recover, not his property, but the *value* of it. And why sustain this action, for the sheriff to recover nominal damages, which can be of no use to the creditor? And if this suit may be sustained against Fox, why may not he sustain an action against Adams, and recover the damages and costs, to which he has been subjected in this suit?

The opinion of the court was delivered by

REDFIELD, J. The only question in this case is, whether a receipt man may defend the suit of the sheriff, by showing that the property belonged to him at the time of the attachment. The case of *Learned v. Bryant*, 13 Mass. 222, decides, that the receipt man may show that the property belonged to a third person, who has claimed it, and to whom it has been surrendered. The case of *Barsley v. Hamilton*, 15 Pick. 40, decides, that the receipt man may show property in himself in *mitigation of damages*; and, in consequence of such proof, the recovery was merely *nominal* in that case. The case of *Jones v. Gilbert*, 13 Conn. 507, seems to decide, in general terms, that such a defence is available to the fullest extent; although that question, in that particular case, only affected the *quantum* of the damages, there being other property, to which that question did not extend.

The principle of all these cases is the same, I think. The question is, whether the officer is answerable over to any one; and if not,

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the defence is received, to prevent circuity of action. It is rather anomalous, to suffer an officer, in such case, to recover nominal damages; and if it could be justified upon any ground, it would seem to be on that of the receipt man's not asserting his claim at the time of the attachment, and thus leading the officer astray. In such case, perhaps, the officer ought not to be cast in the suit, and burdened with a bill of cost. And I can conceive, that, if the officer had been induced to forego farther attachment, which he might else have made, in consequence of the receiptor's silence, he might thus, in equity and justice, make himself liable for the full value of the property. But nothing of that kind exists in the present case. The claim of the receipt man was seasonably asserted, the officer has not been decoyed, or deceived, he is answerable over to no one, and to refuse this defence is to give to this class of contracts a force and validity, which they have not hitherto had.

There is no strict estoppel, except by record, or deed. When parol contracts have been construed in the *nature of an estoppel*, it has been to *prevent fraud*. And, as I have said, if the defendant had made no claim to this property at the time of the attachment, that might present a case, where he would be estopped, by his silence, from asserting a claim to it, or showing any such fact in defence of a suit upon the receipt. But, in the absence of all fraud, I apprehend that such defences are always allowed in analogous cases. The person, who submits to the attachment, is supposed to act under a species of duress, because he cannot resist it. It is much the same as one giving bail on an irregular process; he, or his bail, may, ordinarily, defend upon *scire facias*; *Aiken v. Richardson*, 15 Vt. 500. It is much the same, in principle, as that of paying illegal toll,—which the party may always recover back, or he may defend a contract given for the same. This last case is not, however, fully in point, because *there* is illegality, as well as duress. The receipt only admits the formal attachment, but not that it is *legal*, and binding upon the property. The receipt man undertakes to re-deliver the property, or show what will excuse the officer from all liability to any one on account of the property not being surrendered. That was done in the present case.

Judgment affirmed.

Bank of Bellows Falls v. Deming et al.

BANK OF BELLOWS FALLS v. RILEY A. DEMING and ALBERT ONION.

Where a debtor makes an assignment of all his property for the benefit of all his creditors, any one of the creditors, who does not become a party to the deed of assignment, may sustain an action at any time, upon his claim, against the debtor, even though such creditor may have received from the assignee, out of the trust fund, a payment towards his claim.

And if there be appended to the assignment an acceptance, to be signed by the creditors, by which those signing agree to await the accounting of the assignee, which acceptance is signed by a large proportion of the creditors, yet no assent to such clause, on the part of a creditor who does not sign such acceptance, will be implied from the fact that such creditor received from the assignee, out of the trust fund, a payment upon his claim, before he commenced any action upon his claim; nor will the acceptance of such payment by him, under these circumstances, preclude him from the right to commence such action at any time.

But, as against a creditor who signs such acceptance, such clause will operate as a temporary bar of his right of action upon his claim. *Kingsbury v. Deming et al.*, Windsor Co. 1843, cited by WILLIAMS, J.

ASSUMPSIT upon a promissory note. Plea, the general issue, and trial by jury.

On trial, the plaintiff having proved the execution of the note declared upon, the defendants offered evidence tending to prove, that, about ten months subsequent to the execution of the note declared upon, they made an assignment of all their property, for the benefit of their creditors generally; they also offered the said assignment in evidence, with the acceptance upon it by the assignees, in writing, of the trust, and also the acceptance, indorsed upon it, of a number of the creditors of the defendants, (but not signed by the plaintiffs) by which the creditors signing it agreed to receive the dividends, which might accrue to them "after a faithful accounting by the said assignees, and await the same." The defendants also, in the same connection, offered evidence tending to prove that the plaintiffs knew the terms of said assignment; that, about three months after the execution of the assignment, the plaintiffs' agent, N. Fullerton, having in his possession the note declared upon, was in the store of the assignees, where they were doing business as such assignees, and that the assignees made to said Fullerton a payment, as a por-

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tion of the plaintiffs' dividend on said note; and that said payment was made from the trust funds, and was indorsed at the time upon the note by Fullerton, who knew all these facts at the time; that this was prior to the commencement of this action; and that the assignees had not, at the time this action was commenced, rendered an account of their doings under said assignment.

The testimony thus offered by the defendants was objected to by the plaintiffs, and excluded by the court; to which decision the defendants excepted. The jury returned a verdict for the plaintiffs.

O. Hutchinson and *N. Richardson* for defendants.

The testimony, offered by the defendants, should have been admitted, for,

1. The reception, by the plaintiffs, of the money from the assignees, and the indorsement of the same upon the note, as a part payment, was, in law, (as in equity,) an assent to the assignment. 2 Kent 533. *Drakeley et al. v. De Forrest et al.*, 3 Conn. 272, [Day's Dig. 20, § 8.]

2. The plaintiffs were therefore estopped from this suit, as was expressly decided by this court in the case of *Kingsbury v. Deming et al.*, Windsor Co., Feb. T. 1842.

L. Adams for plaintiffs.

The express written agreement, at the end of the assignment, for delay, was never signed by the plaintiffs, and no such agreement can be implied.

The opinion of the court was delivered by

WILLIAMS, Ch. J. We can see no reason for reversing the judgment of the county court. There is nothing in the terms of the assignment, which bound the creditors to delay commencing suits. Neither is there any such agreement to delay implied in the fact of the plaintiffs' accepting and receiving the amount paid to them by the assignees, as trustees.

The case of *Kingsbury v. Deming et al.*,* decided in this county

**Era Kingsbury v. Riley A. Deming and Albert Onion*, Windsor Co. Feb. T. 1842. This was an action of assumpsit upon a promissory note, signed by the defendants as partners, and came to the county court by appeal. In the

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in February, 1842, can be no authority in the case. In that case there was an agreement in writing, signed by Kingsbury, by which he accepted the provisions made in the assignment, and agreed to accept the dividends, which might accrue, and await the same. This was held to be a temporary bar. In the case before us, there is no such acceptance, or agreement. The judgment of the county court is therefore affirmed.

County court the defendants pleaded, in bar of the plaintiff's action, that, prior to the commencement of this action, they had made a general assignment of all their partnership property, for the benefit of all their creditors, of whom the plaintiff was one,—setting forth the terms and provisions of the assignment,—and alleged that the plaintiff, “in writing, under his hand, accepted the said provision, so made for him, as aforesaid, and then and there, in consideration thereof, to wit, of said assignment and the provisions therein, as aforesaid, the said plaintiff agreed to await the said accounting of the said assignees, and the payment of the dividend which might accrue and belong to the said plaintiff, as aforesaid, and to forbear and suspend all process of collection of said note, in the said action sued, until the said accounting of the said assignees, as aforesaid, and until a reasonable and proper time be allowed to said assignees for rendering their said account,” &c.; and the defendants averred, that, at the time of the commencement of this action, such reasonable and proper time had not elapsed, and that the said assignees,—who accepted the trust,—had not completed the duties of their appointment, nor rendered any account of their doings. This plea was traversed by the plaintiff, and issue was joined to the court.

Upon the trial of the issue the only evidence offered by the defendants was an assignment in writing, executed by the defendants, bearing date prior to the commencement of this action, which purported to convey to the assignees, therein named, all the partnership property of the defendants “in trust, to make sale of the property herein conveyed, and collect the debts and choses in action belonging to us, with all due diligence, to defray their expenses in the business intrusted to them herein, to pay the several joint creditors of the said R. A. Deming & Co., in equal proportions, then to pay the balance, if any, in equal shares, one half to the creditors of the said Albert, and the other half to the creditors of the said Riley A., to keep an account of their doings, and the same render to the said Riley and Albert, and to pay them the balance, if any, which may remain in their hands,” and also an acceptance in writing, indorsed upon the back of said assignment, and signed by the plaintiff, prior to the commencement of this action, and by several creditors of the defendants, which was in these words,—“We hereby accept of the provision made for us in the foregoing assignment, and agree

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ALVIN DUTTON v. THE VERMONT MUTUAL FIRE INSURANCE COMPANY.

The seventh section of the Act of the legislature incorporating the Vermont Mutual Fire Insurance Company, by which a time is limited for commencing actions against the Company for losses by fire, applies to a case, where the directors, after examining a claim for loss, wholly disallow the claim; and the operation of this section, in this respect, is not affected by the statute of Nov. 18, 1839, which specifies the time for payment for such losses.

Therefore, where a member of the Company, residing in Windsor County, suffered a loss by fire, and duly notified the company thereof, and the directors, after making an examination of his claim, wholly disallowed the same, and notified him of their determination in January, and more than sixty days before the next term of the county court in either Washington or Windsor County, and he neglected to commence his action against the company for his loss at the next term of either of said courts, it was held that his right of action was barred by the seventh section of the act of incorporation, notwithstanding he was not, by the act of Nov. 18, 1839, entitled to demand payment of said claim until a time subsequent to each of said terms.

In the construction of a statute regard must be had to the intention of the makers of it; and this intention, many times, is to be ascertained from the occasion or necessity of making the statute.

Assumpsit upon a policy of insurance, dated April 1, 1840, by which the defendants insured the plaintiff against loss by fire, to the amount of eleven hundred dollars, upon certain property specified; and the plaintiff alleged that a portion of the property insured had been destroyed by fire. The writ bore date March 31, 1842.

"to receive the dividends, which may accrue to us after a faithful accounting by the said assignees, and await the same." To the admission of this evidence the plaintiff objected, but it was received by the court, and judgment was rendered in favor of the defendants; to which decision the plaintiff excepted.

In the supreme court the case was argued by *D. Kellogg* and *L. Adams*, for plaintiff, and by *N. Richardson* and *O. Hutchinson*, for defendants; and the Court held, that the facts pleaded, and proved, showed a sufficient consideration for the agreement entered into by the plaintiff, and that the agreement, signed by him, operated as a temporary bar of his right of action, and that the evidence of such agreement, in the form in which it was offered, was properly received; and the judgment of the county court was affirmed.

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The defendants pleaded in bar, setting forth the seventh section of their act of incorporation,* and averring that the damage by fire to the plaintiff, mentioned in his declaration, happened on the third day of August, 1840, at Hartland, in the county of Windsor, and that on the sixth day of August, 1840, the plaintiff duly notified the defendants of his loss, and claimed that they should settle and adjust the same, and pay him the amount thereof, according to the provisions of the policy, and that such farther proceedings were had, that afterwards, on the sixth day of January, 1841, the defendants, by their directors, rejected and disallowed the plaintiff's claim, and refused to pay him any thing on account thereof, and that the plaintiff had notice of said disallowance on the ninth day of January, 1841, at Hartland, where he resided, which was more than sixty days before the then next term of the Washington county court, which was holden in April 1841, and more than sixty days before the then next term of the Windsor county court, holden in May, 1841, to one of which said terms of said courts, this action should have been

*By which it is enacted, "That, in case of any loss or damage by fire happening to any member, upon property insured in and with said Company, the said member shall give notice thereof, in writing, to the directors, or some one of them, or to the secretary of said company, within thirty days from the time such loss, or damage, may have happened, and the directors, upon a view of the same, or in such other way as they may deem proper, shall ascertain and determine the amount of said loss, or damage; and if the party suffering is not satisfied with the determination of the directors, the question may be submitted to referees, or the said party may bring an action against said company for loss, or damage, at the next court to be holden in and for the county of Washington, or in the county in which said party may reside, or in which said loss, or damage, by fire may have happened, and not afterwards, unless said court shall be holden within sixty days after said determination; but if holden within that time, then at the next court holden in said county thereafter; and if, upon trial of said action a greater sum shall be recovered, than the amount determined upon by the directors, the party suffering shall have judgment therefor against said Company, with interest thereon from the time said loss, or damage, happened, and costs of suit; but if no more shall be recovered than the amount aforesaid, the said party shall become nonsuit, and the said Company shall recover their costs. *Provided*, however, that the judgment last mentioned shall in no wise affect the claims of said suffering party to the amount of the loss, or damage, as determined by the directors aforesaid."

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brought, according to the provisions of the said seventh section of the act of incorporation. To this plea the plaintiff demurred.

The county court rendered judgment that the plea was sufficient; to which decision the plaintiff excepted.

Tracy & Converse for plaintiff.

1. Was the plaintiff bound to commence his suit either at the April Term of Washington County Court, or the May Term of Windsor county court, 1841, considered with reference merely to the provisions of the original act of incorporation? This question is to be determined by a construction of the seventh section of said act.

1. This section should receive a strict construction. It is in the nature of a penal law. It is in derogation of the right of suitors in general. It is not to be regarded as a statute of limitations, in the common and ordinary acceptance of the term.

2. But give to the section the most liberal construction, that any rule of interpretation will admit, and it does not embrace this case, as we insist. "If the party suffering is not satisfied with the determination of the directors," &c. What determination is here meant? Most obviously it is the determination referred to in the next preceding sentence;—"And the directors, upon a view of the same, or in such other way as they may deem proper, shall *ascertain and determine the amount of said loss or damage*," &c. These two sentences must be construed together, and the "determination" must be a "*determination*" of the amount of the loss or damage," and not a "*determination*" rejecting altogether all claim for loss or damage. The two are decidedly different things. In order to render it obligatory upon the claimant to commence his suit at the "next term of the Court," &c., the directors must first "*ascertain and determine the amount of loss or damage*," and the suffering party must be dissatisfied with such ascertainment and determination of the "amount of the loss or damage." But in this case the directors refused to ascertain and *determine the amount of the loss*. They did not even determine that there was *no "loss."* They simply rejected and disallowed the claim for the *loss*, and refused either to ascertain the amount of the loss, or pay any thing therefor, or do any thing whatever in relation to it. Such being the fact, we insist

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that the plaintiff had the same right enjoyed by other persons in bringing suits for breaches of contracts, and could bring his suit for the breach of the contract of insurance at any time within six years after the right of action accrued.

3. The proviso to the same section shows very satisfactorily, as we conceive, that the above view of the subject is the correct one;—
“Provided, however, that the judgment last mentioned shall in no wise affect the claim of said suffering party to the *amount of loss or damage, as determined by the directors aforesaid.*”

II. But, providing we are altogether wrong in our construction of this section, and that the construction contended for by the defendants is correct, we contend that the particular provisions of that section, as construed by the defendants, have been virtually superseded and repealed by the act of Nov. 18, 1839.* By the latter act the defendants did not become liable to pay the plaintiff his loss till the first of December, 1841, the directors having made their “*determination*” in the matter the 6th of January, 1841, according to the view of the defendants. No suit could therefore be sustained against the defendants, for the loss, until after two terms of the Court both in Washington and Windsor Counties had intervened.

But will it be said that the plaintiff was entitled to an *order* on the *Treasurer* for the amount of his loss before the next session of the court in either of said counties, and, being refused such order, he might have brought his suit for such refusal? Providing he could have sustained a suit at all, (which we regard as by no means clear until after the money had become due and payable,) he

*By which it is enacted, “That all losses, which shall happen on policies issued by said company after the first day of January, A. D. 1840, and which shall be ascertained and adjusted on or before the first Wednesday in August, in any year thereafter, shall be paid by said company on the first day of December then next following; and all losses which shall be ascertained and adjusted between the said first Wednesday in August and the first day of December, in any year, shall be paid by said company on the first day of November next following the said first day of December. And the insured shall be entitled to an order for the amount of such loss, drawn by the secretary, and accepted by the treasurer of said company, at the end of three months from the time of notice of said loss to said company, which order shall be on interest.”

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could, at most, have recovered but nominal damages. He must, therefore, have brought a second suit for the recovery of the amount of the loss, after the same had become due. It must be an extraordinary exposition of those statutes, which could require the prosecution of an *unnecessary*, if not an *absolutely groundless* and *unsustainable* suit, merely to save the right of action for the main matter in controversy.

L. B. Peck for defendants.

1. By the section of the act of incorporation, recited in the plea, it is apparent that the plaintiff comes too late with his action. His claim was rejected by the Company on the 6th day of January, 1841, of which he was notified on the 9th of the same month. The court at that time sat in Washington County on the second Tuesday of April, and in Windsor County the last Tuesday of May, and to one of those Terms the action should have been commenced, as it was more than sixty days from the 9th of January to either of those terms. The *determination*, mentioned in the 7th section, is the allowance or rejection of the claim for damages. The time within which losses are to be paid does not affect the question. The plaintiff did not resort to his action until May, 1842, and he must abide the consequences of his own neglect.

2. The declaration is bad in substance.

The opinion of the court was delivered by

BENNETT, J. The seventh section of the act to incorporate the Vermont Mutual Fire Insurance Company provides, that, in case of any loss or damage upon property insured, the person, whose property was insured, shall give notice of the loss, or damage, in writing, within thirty days from the time when it occurred; and the statute then empowers the directors, upon a view of the same, or in such other way as they may deem proper, to ascertain and determine the amount of the loss, or damage; and if the party insured is not satisfied with the determination of the directors, the question may be submitted to referees, or he may bring his action within a given time, specified in the act, and not afterwards.

No question can be made, but what this action is barred, provided the case itself is one within this section of the statute. It is

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said, in argument, that, as the directors entirely rejected and disallowed the plaintiff's claim, and refused to pay him any thing for his supposed damages, the case is not within the provisions of this special act, but should be governed by the general statute of limitation. In the construction of a statute we must always have regard to the intention of the makers of it; and this intention, many times, is to be collected from the occasion, or necessity, of making the statute, or some particular provisions in it. When the intention is once discovered, it should, with reason, be followed, in giving effect to the statute, even though such construction seem somewhat opposed to the letter of the statute. The reasons, why all claims for loss or damage against the Mutual Insurance Company should be adjusted as speedily as is consistent, are quite obvious. All the individuals, who become interested in the company by insuring therein, become members thereof during the terms of their respective policies, but no longer. It is impossible for the directors to settle and determine the several sums to be paid by the several members of the Company, as their respective proportions of the losses, until they have been liquidated in some one of the ways pointed out in the seventh section of the act. Every reason, which would require a final adjustment, as speedily as possible, of any claim for loss, or damage, would apply with equal force, whether the claim was entirely rejected by the directors, or only in part; and though the statute speaks of the directors, ascertaining the amount of the loss, or damage, and the dissatisfaction of the suffering party with their determination, yet it is no forced construction of language to apply the provisions of the act to cases, where the directors reject the *entire* claim, whether for one cause, or another. To hold that this should make a difference in the time allowed for bringing the action would be absurd in its consequences, and an irrational construction of the statute.

It is claimed by the plaintiff's counsel, that the seventh section of the act of incorporation, at least so far as the bar is concerned, is superseded and virtually repealed by the act of November 18, 1839. But we think not. That statute only provides in regard to the time when the Company shall pay for losses, which have been ascertained and adjusted. If, on policies issued after the first of January, 1840, the losses shall be *ascertained and adjusted* on or before the first

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Wednesday in August, in any year thereafter, the losses shall be paid on the first day of December following, and if *ascertained* and *adjusted* between the first Wednesday of August and the first day of December, in any year, then such losses shall be paid on the first day of November next following. It is difficult to see how this statute is opposed to the seventh section of the original act of incorporation, relative to the time when claims shall be barred.

As we think the plea in bar is sufficient for a good declaration, there is no occasion to examine the objections raised in argument to the present declaration.

The judgment of the county court is affirmed.



HARVEY HERRICK v. ARTEMAS RICHARDSON.

If the plaintiff's claim, in an action of *assumpsit*, is in the nature of book charges, and the defendant files a declaration on book account in offset, and the plaintiff, on the trial before the auditor, chooses to present his whole claim by way of an account in offset to the account presented by the defendant, and the auditor considers and decides upon the whole matter, and reports that there is a balance due from the plaintiff to the defendant, and that report is accepted by the county court, and judgment is rendered thereon in favor of the defendant, for the balance found due by the auditor, the plaintiff's claim becomes thereby *res adjudicata*, and he cannot be allowed to prosecute his claim farther, on the trial of the original action; but judgment must be rendered therein for the defendant, for the balance found due to him on the declaration in offset.

Where, in such case, the plaintiff, in his declaration in the original suit, claimed for certain property, which had been delivered by him to the defendant, to be disposed of, and the account presented by the defendant before the auditor consisted mainly of charges for his services as agent, and for money paid by him to the plaintiff, as the avails of the property sold by him, and the plaintiff presented his whole claim before the auditor, to be passed upon by him, as an offset to the defendant's account, and the auditor considered the accounts upon both sides, as presented, and reported that there was a balance due to the defendant, it was held that the whole matter might thus be settled in the form of an action on book account.

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And if, in such case, the plaintiff's claim be not strictly of a nature proper to be settled in the action on book account, yet if the plaintiff himself have presented the claim before the auditor, and it has been adjudicated upon without objection on the part of the defendant, the plaintiff cannot afterwards claim, on the trial of the original action, that he is entitled to prove the same claim, upon the ground that it should properly have been settled in that form of action, rather than as a claim on book account.

ASSUMPSIT to recover the avails of certain property, received by the defendant to sell as agent for the plaintiff, and for which the plaintiff alleged that the defendant had not accounted. The defendant filed a declaration on book account in offset, on which judgment to account was rendered, and an auditor was appointed.

On the trial before the auditor the defendant presented his account, and the plaintiff, as an offset thereto, presented, in the form of an account, the same claim upon which the original action was founded,—which consisted, mostly, of charges for stoves delivered by him to the defendant, to sell as agent, a part of which the defendant had sold, and received the avails, and the remainder of which were not disposed of, but still continued in the possession of the defendant. The auditor examined the accounts of the parties fully, as presented before him, and reported that there was a balance due to the defendant, to balance the accounts, of \$25.21. The report was accepted, and judgment rendered thereon, by the county court.

On the trial of the original action the plaintiff offered evidence to substantiate the claim set forth in his declaration, to which the defendant objected, for the reason that the whole subject matter had been submitted to and passed upon by the auditor. The county court sustained the objection, and rendered judgment in the action, in favor of the defendant, for the balance adjudged due to him on the declaration in offset; to which the plaintiff excepted.

A. P. Hunton for plaintiff.

There is error in the judgment of the county court,—

1. Because the claims, adjusted before the auditor, are such as, by law, cannot be settled in the action of book account. *Allen v. Thrall*, 10 Vt. 255. *Hall et al. v. Peck et al.*, 10 Vt. 474. The defendant was the plaintiff's factor; he was entrusted with the possession of the goods, and was employed to sell them and receive the

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pay. 1 Chit. on Cont. 56, 57. The mode of compensation does not determine the kind of agency, nor affect the rights, or liabilities, of the parties. The proper remedies, by suit, are either account at common law, or assumpsit; 2 Saund. Rep. 127, n.; and these remedies are reciprocal. Factors have also a remedy by a lien upon the goods; 1 Com. on Cont. 267; he has also the right to retain the money in his hands, and is paid, so far as money of the principal has been received by him, and, if he has sufficient, he can sustain no suit against his principal; but if he should bring one, such being the fact, it would be unnecessary for the principal to plead in offset;—the law makes the application. *Hereford v. Powell*, cited in 1 Com. on Cont. 271. Rights like these cannot be settled in the book action.

2. A factor cannot bring an action for factorage, unless the principal refuse to come to account. *Hereford v. Powell*, *ub. sup.* The facts, necessary to be proved, are the same, whatever may be the form of the action. The report does not show that the defendant ever offered to account, or requested the plaintiff to account, or pay any thing to him, or that the plaintiff ever declined to account.

3. There was nothing submitted to the auditor, but what was included in and is a part of the transaction, which is the foundation of the plaintiff's suit, and which should be there tried. A matter of this kind cannot be separated, nor the whole of it be transferred from the original suit to a declaration in offset.

Tracy & Converse for defendant.

1. If the judgment of the court below, accepting the report of the auditor, was correct, the court properly excluded the testimony offered on the trial of the main case. Because, if the testimony had been admitted, it must have gone to the jury with the fact, that the same matter, sought to be established by the testimony, had already been decided upon in the proceedings upon the book account; and this fact would have entirely neutralized the testimony offered, if suffered to have its legitimate effect.

2. If the testimony offered was not thus subject to be neutralized by the accompanying fact, in the minds of the jury, it should surely be withheld from them; otherwise the plaintiff would recover twice for the same thing.

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3. The facts in the case being ascertained, it could no longer be a question to the jury, but was purely a question of law; the testimony, therefore, was properly withheld from the jury.

4. The matters passed upon by the auditor were properly within his cognizance. They were intrinsically proper subjects of book charge,—at least, those presented by the defendants were so. If any of the claims, passed upon by the auditor, were objectionable, as being without his jurisdiction to try, they were those which were presented by Herrick; and, most obviously, *he* cannot now say that they were improper matters for the auditor to pass upon.

The opinion of the court was delivered by

HEBARD, J. The plaintiff, in the original action, offered to prove the claim set up in his declaration; and this was objected to, for the reason that the whole subject matter had been adjusted by the auditor. There can be no doubt but that this objection was well taken, provided the defendant's claim was a proper matter to be adjusted in a declaration on book account.

In an action *ex contractu* the defendant may plead in offset any matter of contract; and the nature of the claim *determines* the form and mode of proceeding. If the claim is on book, then it must be sent out to auditors, and there be adjusted; and to this the plaintiff may file in offset his book account, so as to arrive at the balance.

If the claim of the plaintiff, upon which the main action is founded, is in the nature of book charges, and he submits it to the *jurisdiction* of the *auditor*,—as he may do,—and the *auditor* passes upon and adjusts it, the plaintiff cannot afterwards break away from that adjudication by the auditor and claim a new hearing, upon a different mode of proof, and in a different form of trial, with the hope of a more favorable result. This would contravene the well settled principle of law, under which a matter, once passed upon by a competent tribunal, is treated as *res adjudicata*. If the plaintiff consents to merge his original cause of action in a new one, he does so as a matter of *choice*. He might have refused to submit his claim to the determination of the auditor; but we do not see any injustice in the proceeding, since the result must have been the same. This view of the case is fully sustained by the case of *Cross et al. v. Haskins*, 13 Vt. 536. The balance, in that case, was in favor of the plain-

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tiff, but the principle was the same. The main question, therefore, is, whether the subject matter of the transaction could properly be adjusted in the book action.

Upon this point, it is insisted that the matter between the parties was of such a character, that it could not, consistently with legal proceedings, be adjusted in this manner,—but that it should be settled in an action of assumpsit, or account. So far as convenience is concerned, the *book action* is preferable to assumpsit, and the remedy is as ample; and little can be said in favor of the action of account over the action on book account. Much of the defendant's claim was strictly of the nature of book account. The most objectionable part, of all which was submitted to the auditor, was that which the plaintiff himself presented,—being for property delivered to the defendant to sell, and for which the defendant was not chargeable, until he had sold it and had received the pay. But to this the defendant makes no objection, and the plaintiff, of course, has no right to object.

The judgment of the county court is affirmed.



NATHANIEL PINGRY v. JOEL G. WATKINS.

[Same Case, 15 Vt. 479.]

Questions once decided in a case in the Supreme Court are not open for argument, when the same case is again before the court at a subsequent term.

When there is no *latent* ambiguity in a deed, the intention of the parties must be ascertained from the instrument itself, and cannot be shown by parol evidence.

Where, in an action of covenant for rent, brought against the assignee of the lessee, the plaintiff alleged that all the estate, right, interest, &c., of the lessee in the demised premises came to and vested in the defendant, by assignment thereof, and that the defendant entered into possession of said premises after said assignment, and retained the possession thereof until the rent sued for became due, and the defendant pleaded that the estate, right, &c., of the lessee did not come to and vest in him, as alleged in the declaration, and that he was not possessed of and in the said demised prem-

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ises in manner and form as the plaintiff had alleged, upon which plea issue was joined, it was held that the fact of the assignment was the only material part of the issue, and the only part which the plaintiff was required to prove, and that the defendant could not be allowed to prove that he did not in fact take possession of said premises after the assignment.

Where an assignment of dower and other records in the office of the probate court are referred to as part of the description of premises in a conveyance of real estate, they may be used as evidence in court, for the purpose of identifying the premises conveyed, notwithstanding they may never have been recorded in the office of the town clerk of the town in which the land lies.

THIS was an action of covenant for the non-payment of rent.

The plaintiff declared, that, on the 13th day of February, 1833, he, with his then wife, Rebecca Pingry, executed to Charles W. Watkins, his heirs and assigns, for and during the natural life of the said Rebecca, a lease of certain premises in Chester, in the county of Windsor, reserving an annual rent of \$42,50, payable on the first day of April in each year during the said term; that said Charles W. Watkins entered into possession of the premises; that on the 8th day of February, 1840, all the estate, right, interest, &c., of the said Charles W. Watkins in the said premises, then to come and unexpired, 'by assignment thereof then and there made, legally came to and vested in the defendant; that thereupon the defendant entered into possession of the said premises, and continued in possession thereof until the decease of the said Rebecca, who died on the 5th day of July, 1840; and that the defendant had not paid the said sum of \$42,50, which became due, by virtue of said lease, on the first day of April, 1840.

The defendant pleaded that all the estate, right, interest, &c., of the said Charles W. Watkins in the said premises, then to come and unexpired, did not come to and vest in the said defendant by assignment thereof, and that he was not possessed of and in the said demised premises in manner and form as the plaintiff had alleged; and upon this plea issue was joined. There was a second count in the declaration, which alleged the fact of the assignment, but not that the defendant took possession of the premises; and on that count issue was joined as to the fact of the assignment, only.

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On trial the plaintiff gave in evidence the lease declared upon,—in which the demised premises were described, as being “all that certain part of the real estate of Elias Watkins, seinor, late of Chester, deceased, that was set off to the said Rebecca, as widow of the deceased, as her thirds, lying and being in Chester aforesaid, together with the buildings thereon, as set to her by a committee appointed for that purpose,—the particular boundaries and description thereof being set forth in the return of said committee, and the particular part of the buildings, as described thereon; reference is had thereto.”

The plaintiff then offered in evidence a copy, from the probate records, of the assignment of dower of the said Rebecca, as widow of the said Elias Watkins, senior, dated April 16, 1814; also of the assignment of the remainder of the said Elias Watkins' estate to his son, Elias Watkins the younger, by the probate court, dated Jan. 14, 1844; to both which the defendant objected, for the reason that they had not been recorded in the office of the town clerk of Chester; but the objection was overruled by the court. The plaintiff also offered in evidence the division of the estate of Elias Watkins the younger, who was the father of the defendant and of the said Charles W. Watkins, among his six children; to the admission of which the defendant also objected; and the objection was overruled by the court.

The plaintiff also offered in evidence a quitclaim deed, executed, on the 8th day of February, 1840, by the said Charles W. Watkins to the defendant,—the descriptive part of which was in these words;—“all the right, title, interest, property, estate and demand which I, the said Charles W. Watkins, have in and to certain tracts, pieces, or parcels of land, lying and being in Chester aforesaid, described as follows, to wit,—all that certain piece of land, set to me as my share of the home farm of my late father, Elias Watkins, deceased, as the same is described by the doings of the committee on record in Chester land records, having reference to the said records for the bounds thereof. Also, one other piece, set off by said committee of the reversion of the widow Rebecca Howe, late widow of Elias Watkins the elder, deceased, having reference to the records aforesaid for the particular bounds thereof. Also, all my right, title, or share, of the reversion of the thirds set off to

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'the widow Sally Watkins of the estate of my said father, which I 'now have, or may hereafter have therein in common and undivided, or that may be hereafter set to my share on a division thereof,—be the same more or less." The plaintiff claimed that the premises secondly described in said deed were the same with the premises demised in said lease. To the admission of this deed in evidence the defendant objected; but the objection was overruled by the court.

The plaintiff proved that the said Charles W. Watkins went into possession of the said demised premises under the lease, and continued in possession thereof until he executed the said deed to the defendant. The plaintiff also proved that the house and buildings, mentioned in the assignment of dower to the said Rebecca, are on the land which was assigned to the said Charles W. Watkins in the said division of the estate of his father, Elias Watkins the younger. And it appeared, that, in the partition of the estate of Elias Watkins the younger, among his six children, the reversion of the said Rebecca's said dower was divided into six parts, of which her right in the buildings was considered one part and was assigned to said Charles. The plaintiff also gave evidence tending to prove that the land, so assigned to the said Rebecca, was known in the family and had acquired the name of the *Reversion*, and was so called in the partition and conveyances. It was conceded by the defendant that the widow Rebecca Watkins, afterwards widow Rebecca Howe, intermarried with the plaintiff prior to the date and execution of the lease from her and the plaintiff to Charles W. Watkins, and that she died on the fifth day of July, 1840.

The defendant then offered to show that he did not take possession of the premises, and that Charles W. Watkins continued in possession thereof until after the decease of the said Rebecca; to the admission of which the plaintiff objected,—and it was excluded by the court.

The defendant also offered in evidence the deposition of Charles W. Watkins, in which he testified that he only intended, by the quitclaim deed of Feb. 8, 1840, to convey to the defendant the reversionary interest, which he, the said Charles, had in the premises demised by said lease,—meaning, as he expressed it, his right of the property after the decease of the said Rebecca. To the admission

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of this deposition the plaintiff objected, and it was excluded by the court.

The defendant requested the count to charge the jury, that, unless they found that the defendant took possession of the premises, he was entitled to a verdict on the first count, and that the deed from Charles W. Watkins to the defendant did not convey to the defendant the leasehold interest of said Charles in the premises.

But the court instructed the jury that the quitclaim deed did convey to the defendant the leasehold interest of Charles W. Watkins in the premises, and that the defendant was liable for the rent, which became due the first day of April, 1840, whether he in fact had the possession, or whether the said Charles continued to occupy there.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

D. Kellogg and N. Richardson for defendant.

1. The County Court erred in rejecting the testimony offered by the defendants, tending to show that he did not take possession of the premises; and also in refusing to instruct the jury, that, unless they found the fact that the defendant did take such possession, he was entitled to a verdict upon the first count in the plaintiff's declaration. It was alleged in the first count of the declaration that the defendant entered upon and took possession of the premises, which were assigned to him, upon which allegation issue was joined by the pleadings. The testimony offered tended to prove the issue, and hence was admissible. If the parties formed an immaterial issue (which we do not admit,) it could not be corrected by excluding the testimony. Gould's Pl. 506, Sect. 28. 1 Chitty's Pl. 631, 632.

2. We insist that the deposition of Charles W. Watkins was admissible, as tending to show the construction which the parties gave to the quitclaim deed from Charles W. Watkins to the defendant. If there is any ambiguity in the deed, it is a latent ambiguity, which may be explained by parol. 2 Phil. Ev. 664. *Storer v. Freeman*, 6 Mass. 425. 6 Pick. 63.

P. T. Washburn for plaintiff.

1. The assignment of dower to the widow Rebecca Watkins

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was referred to in the lease and made a part of that instrument, and was introduced, not in order to support the plaintiff's *title*, but, as made by the parties a part of the description, to identify and limit the premises.

II. The assignment to Elias Watkins the younger and the record of the division of his estate among his heirs were correctly admitted in evidence, to prove the points in reference to which they were offered. In consequence of there being three descriptive clauses in the deed from Charles W. Watkins to the defendant, and of the inartificial manner in which they were drawn, it became necessary to introduce extraneous evidence, not to sustain the *title*, but to explain the latent ambiguity in their language, to identify the premises contained in each clause, and, by showing their *situation*, to enable the court to give the proper construction to the descriptive words. For these purposes these instruments were correctly admitted in evidence, without showing them to have been recorded in the town clerk's office;—for

1. By the Rev. St. c. 44, § 4, copies from the probate office are made "legal evidence in all courts of law and equity."

2. The statute of 1804, (Tol. St. 166, § 3,) cannot be construed as intended to exclude these instruments. In construing statutes we are to search for the *intent* of the legislature; *Butler & Baker's Case*, 3 Co. 25. ROYCE, J., in *Fox v. Hatch*, 14 Vt. 340; a qualified construction may be given to general words: 2 Cov. & H. Dig. 1305, cites *Lyn v. Wyn*, Orl. Bridg. 147; and the *letter* may be enlarged or restrained, according to the true intent of the makers of the law. *Whitney v. Whitney*, 14 Mass. 92. In the preceding section of this very statute we find the required clue to the *intention* of the legislature. After providing that wills, devising real estate shall be recorded in the town clerk's office, it enacts that "copies from such office shall be *legal evidence* of the *title* so devised, &c. When, therefore, the next section enacts that papers not so recorded shall not be "*allowed in evidence*," it must be treated as a continuation of the preceding section, and as meaning that they shall not be allowed as *evidence of the title*.

But the intention of the legislature may be ascertained by resorting to *other statutes* relating to the same subject. *Commonwealth v. Martin*, 17 Mass. 362. The *general system of legislation* upon the

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subject matter may be taken into view, to aid in the construction of any one statute relating to the same subject. *Holbrook v. Holbrook et al.*, 1 Pick. 254. An examination of the statutes of this State, in reference to the object and validity of town clerk's records, will show that object to be merely to give to third persons notice of the *titles* affecting real estate. The statute of 1797, (Sl. St. 210, § 3,) relative to the levy of executions upon real estate, provides that the return of the levy shall be recorded in the town clerk's office, and that, being recorded, &c., it "shall make a good *title*" &c. The Revised Statutes (ch. 42, § 17) use the same words. The statutes, which provide for recording deeds, (Sl. St. 167; Rev. St. c. 60, § 6,) provide also that such deeds "shall be good and effectual in law to *hold* such lands," &c., only as against the grantor, if not recorded. By Rev. St. c. 51, § 9, it is provided that the return of the committee to set off dower, "being recorded in the town clerk's office, the dower shall remain *fixed and certain*." When the probate law was revised, in 1821, it was enacted that "all wills, assignments, &c., affecting the *title* to real estate, should be recorded in the town clerk's office." Slade's St. 351, § 86. This we consider a re-enactment of the statute of 1804, with the changes which the construction, perhaps, of courts, long practice, and analogous legislative enactments had sanctioned.

III. The deposition of Charles W. Watkins was properly excluded by the court, as being an attempt to explain by the parol testimony of the grantor in a deed his *intentions* in executing it.

IV. As assignee of the lessee the defendant was liable to pay the *whole rent* becoming due for the year ending April 1, 1840, notwithstanding he became assignee in the middle of the term. *Wood v. Partridge*, 11 Mass. 493. 2 Bac. Abr. 70. 1 Saund. Pl. & Ev. 391. *Kimpton v. Walker*, 9 Vt. 191. 6 Com. Dig. 212. *McMurphy v. Minot*, 4 N. H. Rep. 251. *Demarest v. Willard*, 8 Cow. 206. *Duppa v. Mayo*, 1 Saund. R. 287. Salk. 65. Co. Lit. 150 a.

The opinion of the court was delivered by

BENNETT, J. This case was before the Supreme Court, upon a bill of exceptions, in 1843, and most of the questions saved by this bill of exceptions were then disposed of, and are not open to farther

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argument. The legal construction of the lease was then settled. See 15 Vt. 479.

It is now claimed in argument, that there was error in the county court, in rejecting the deposition of Charles W. Watkins, and that that was proper evidence to explain and give construction to the quitclaim deed from the deponent to the defendant. But there was no *latent* ambiguity, which calls for an explanation by parol; and, in a case like the present, the intention of the parties must be derived from the instrument itself. It is a principle of universal application, that, if there is an ambiguity on the face of a written instrument, it cannot be explained by parol. It has also been said, that it should have been admitted as proof upon the issue joined upon the plea to the first count in the declaration. It is to be remarked, that the defendant, in that plea, avers that the demised premises did not come to and vest in the defendant by the assignment thereof, and that he was not possessed thereof, as alleged in the declaration. Issue is joined upon the plea. The fact of the assignment of the leased premises from Charles W. Watkins to this defendant is the only material part of the issue, and that which the plaintiff was only called upon to prove, to entitle himself to a verdict. Clearly, then, it was not error for the court to exclude evidence on the part of the defendant relating solely to the possession. Had the possession been a material part of the issue, it would have been otherwise; and had the issue been wholly *immaterial*, by having been joined upon the fact of possession alone in the assignee, the defendant, on the trial of such issue, which the parties had seen fit to join, should probably have been entitled to any testimony, that was proper to disprove the issue.

We think the objection to the admission of the probate records, setting out the widow's dower in the estate of Elias Watkins, for the want of their being recorded in the town clerk's office, cannot avail. The object of their admission was simply for a reference to the description there given, and to give locality to the lands specified in the quitclaim deed from Charles W. Watkins to the defendant; and not for the purpose of making out title under the probate proceedings.

It was held, when this case was before us in 1843, that the de-

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defendant acquired the whole leasehold estate, and that the plaintiff was entitled to recover the whole rent demanded.

This bill of exceptions presents no new questions, upon which the defendant can succeed in reversing the judgment of the County Court, and the judgment of that court is affirmed.



SARAH WOODBURY v. BENAIAH SHORT.

Where the course of a stream, running across the land of the defendant to the plaintiff's land, was changed by a sudden and unusual flood, so as to run upon the defendant's land without passing over the plaintiff's land, and the defendant permitted the water to run in the new channel, thus formed, for ten years, it was held that he was bound by his acquiescence, and that he had no right, after such lapse of time, to obstruct the stream upon his own land, so as to divert it from the new channel into the channel in which it had formerly passed across the plaintiff's land.

TRESPASS ON THE CASE for so diverting a stream of water from its natural and usual course, as to cause it to flow over and inundate the plaintiff's land. Plea, the general issue, and trial by jury.

On trial the plaintiff gave evidence tending to prove that the defendant, in 1840, obstructed the course of a stream of water, upon his land, so as to cause it to flow over the plaintiff's land, as alleged in her declaration; whereby she suffered injury.

The defendant gave evidence tending to prove, that ever before and until the year 1830 the said stream had flowed in a certain direction, and that in 1830, in a sudden and unusual flood, the said stream changed its course on the defendant's land; and that what he did, in 1840, was only to direct said stream back, into the channel in which it had run prior to 1830.

The plaintiff requested the court to charge the jury that the defendant had no legal right, under the circumstances, to direct the stream into its former channel, if the so doing would cause an injury to the plaintiff. But the court instructed the jury that the defendant had a legal right, in 1840, to direct the stream into the channel in which it had run prior to 1830.

Verdict for defendant. Exceptions by plaintiff.

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J. S. Marcy and O. P. Chandler for plaintiff.

No principle is better settled, than that no one has a right to divert a stream from its "*natural course*," to the injury of another. The "*natural course*" of a stream is obviously that which it *takes of itself*, uninfluenced by any artificial means whatever. That a stream has, at some time, flowed in another channel and the length of time it has flowed in the channel, from which it is diverted, are circumstances not to be taken into consideration, in determining whether its course is "*natural*."

In the present case the defendant permitted the water to flow in the channel, from which he diverted it, for the period of ten years, without, as far as appears, even intimating any intention of turning it back to its former channel; and it was but reasonable that the plaintiff, and others, whose soil and property might be affected by the water, should, by an acquiescence of such duration, conclude that he had relinquished any right, or intention, he ever might have had of turning the water into its former channel, and consequently omit the use of any means to prevent damage from flooding their lands. *Tyler v. Wilkinson*, 4 Mason 400. *Arnold v. Root*, 12 Wend. 331. 2 Kent 428, [Ed. of 1840.] Angell on Water Courses 222.

Tracy & Converse and A. P. Hunton for defendant.

The defendant had a right to return the water to the old channel, as it was prior to 1830, until barred of that right by an acquiescence of fifteen years, or by his own voluntary agreement;—and in this case there is no pretence that he had parted with his right by his own agreement. *Norton v. Voluntine*, 14 Vt. 239. *Mitchell v. Walker*, 2 Aik. 266. *Shumway v. Simons*, 1 Vt. 53. COLLAMER, J., in *Mattocks v. Bellamy*, 8 Vt. 460. 1 B. & P. 460.

The opinion of the court was delivered by

BARNETT, J. In 1840 the defendant diverted a stream of water from the course, in which it was then running across his land, by reason of which the plaintiff's land was overflowed and injured; and this action was brought to recover the damage, which the plaintiff claims, she has sustained. The case shows that ever before and until 1830 the stream had run in a given channel, and in that year the stream, in a sudden freshet, had changed its course upon the defendant's land, and that it had been permitted to run in its new

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channel until 1840, when the defendant turned it back into its former channel. The question, now presented for our consideration, is, whether the defendant, after so great a lapse of time, had such a right?

It is not necessary to decide, what would have been the rights of the defendant, to have turned back this stream into its former channel, immediately upon its having changed its course, in 1830, and upon that question no opinion is intended to be expressed; but whether that right should exist after a lapse of ten years, when it may be supposed that new rights and new interests may have been acquired, is the question before us.

In Hargrave's Tracts, *De jure maris*, it is laid down, that, when a water course, running between the lands of A. and B., leaves its course and suddenly and sensibly makes its entire channel on the land of A., it wholly belongs to him. See also Angell on Water Courses 222, Sect. 4, on Reliction. In *Ex parte Jennings*, 6 Cowen 518, we have in note (a.) a full extract from Sir Matthew Hale's treatise, *De jure maris*; and on page 537 it is also said, if a river, running between the lands of A. and B., leaves its course and sensibly makes its channel entirely in the lands of A., the whole river belongs to A. The maxim in such case is, *Aqua cedit solo*. In the case before us the entire stream was running upon the land of the defendant, at the point where the course was changed; and we think, that, at all events, if he would restore the stream to its former course, he must have done it within some reasonable time, and before new interests should have been naturally acquired in the course, in which it had been permitted to run.

We may, in this case, well apply the doctrine of *acquiescence*, which is made the ground of acquiring property in the *soil*, which, by the immediate and manifest power of a stream of water, is suddenly taken from one man's estate and carried upon that of another. If it is permitted to remain upon the land, where it is carried, until it cements and coalesces with the soil, the property is changed, and there is no right to reclaim the soil, which had been carried away. The defendant, in this case, having, as it must be supposed, *acquiesced* in the running of this stream in its new channel, and in the creation of new interests, must not now be permitted to disturb them.

The result is, that the judgment of the county court is reversed and the cause remanded for trial.

Read

Dana, Adm'r, v. Lull.

CHARLES DANA, Administrator of GILL WHEELLOCK, v. JOEL LULL, JR.

When a debtor makes a voluntary assignment of all his property to a trustee for the benefit of certain of his creditors, who are specified, and does not provide that the surplus shall be distributed among all his creditors, but there is either an express reservation of the surplus to himself, or no direction given as to the surplus, the effect of which would be, by implication of law, a resulting trust, as to the surplus, to himself, such assignment is fraudulent *per se* and void.

And this is so, notwithstanding it appears in the end that the property assigned was not sufficient to pay the debts due to the creditors named in the assignment.

And where the assignment, in terms, conveyed all the property, which the assignors owned in certain towns named, and it did not appear, either upon the face of the assignment, or from the evidence, that they owned any property which was situated elsewhere, it was held that the court would infer that all the property, which the assignors owned, was thereby conveyed.

One of two partners has not authority to assign all the partnership property to a trustee, for the benefit of the creditors of the firm, and thus put an end to the entire business of the firm. REDFIELD, J., and BENNETT, J.

TRESPASS ON THE CASE against the defendant, as sheriff of Windsor County, for not keeping certain property, attached by one Moses Montague, a deputy of the defendant, on a writ in favor of the plaintiff's intestate against Moulton & Hutchinson, and for not delivering the said property to the officer, to whom was delivered the execution obtained in said suit in which the attachment was made. Plea, the general issue, and trial by jury.

On trial the plaintiff gave evidence tending to prove the material allegations in his declaration.

The defendant insisted that the said property, specified in the return of said Montague, was not the property of Moulton & Hutchinson, nor liable to said attachment; and to prove this he offered, among other testimony, a written instrument in these words.

"Know all men by these presents that we, John Moulton, of

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' Woodstock in the county of Windsor and State of Vermont, and
' Rufus Hutchinson, of Braintree in the county of Orange and State
' aforesaid, partners in the business of manufacturing wool into
' cloth in the towns of Woodstock and Bridgewater, under the firm
' and name of Moulton & Hutchinson, and under the superinten-
' ence and care of John Moulton, one of said firm of said Moul-
' ton & Hutchinson, now, in consideration that whereas we, the
' said Moulton & Hutchinson, being indebted and owing to divers
' persons large and honorable demands and sureties, which we are
' unable to liquidate or pay, or any part thereof, without a great
' sacrifice and waste of property; therefore we hereby this day as-
' sign and surrender unto Samuel Ford, as our assignee, possession
' of all the wools, cloths, finished, and in various stages of manufac-
' ture, now in the factory at Bridgewater, and at Woodstock, and
' also all other property by us, the said Moulton & Hutchinson,
' owned or possessed of in said towns of Bridgewater and Woodstock,
' and to be disposed of and applied as follows, to wit, first to pay
' certain executions, now in the hands of George C. Pratt, deputy
' sheriff, on part of said goods the said sheriff has levied the said
' executions, and also other attachments, made by the said George
' C. Pratt, sheriff, one in favor of William Eastwood, and one in fa-
' vor of Joseph Dunbar and Homer Webster and Richard W. South-
' gate, on goods, horses, harnesses and carriages, and, after the said
' executions and attachments shall be fully paid out of the avails of
' the property aforesaid, then the residue of said goods, horses, car-
' riages and other property shall be applied to the paying of other
' debts;—first, to the workmen, and to persons having furnished and
' paid workmen by us employed; and secondly, to persons which we
' are indebted for signing and indorsing notes for our benefit,
' which are not paid; and also other debts, due for wools, reserving
' all custom goods and wools received of Philo Hatch, Lyman &
' Goodnow, and Adam Hobart & Sons, to manufacture by the
' yard, of which the said Samuel Ford agrees to take charge of, fin-
' ish and deliver to the customers aforesaid. And the said Samuel
' Ford shall at all times, when requested, render an account of his
' doings to us.

' Woodstock, Dec. 16, 1839.

(Signed) Moulton & Hutchinson,
By John Moulton."

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To the admission of this instrument in evidence the plaintiff objected, but the objection was overruled by the court; to which decision the plaintiff excepted. The defendant also gave evidence tending to prove that the said assignment was executed prior to the said attachment by Montague, and that said Ford, the assignee therein named, took immediate possession of the property conveyed, among which was the property in question in this suit, and that he was in possession of said property at the time it was attached by Montague.

The jury returned a verdict for the defendant. Several questions were raised on trial by the plaintiff's counsel, and were reserved in the bill of exceptions; but the case was decided in the Supreme Court wholly upon the validity of the assignment above set forth, and it is therefore unnecessary to notice them.

T. Hutchinson for plaintiff.

We contend that the assignment, offered in evidence by the defendant, ought to have been excluded. It conveys no title at all. It only assigns or surrenders the possession of the property, for Ford to dispose of it in the way therein pointed out, and account to Moulton & Hutchinson on request. It only makes Ford the agent, or trustee, of Moulton & Hutchinson, to keep the property from Wheelock, and is itself, *ipso facto*, a fraud upon Wheelock. *Sherill v. Brush*, 20 Johns. 5. *Hyslop et al. v. Clark et al.*, 14 Johns. 458. It was liable to be revoked by Moulton & Hutchinson at pleasure. *Hilliard* 57. 2 Kent 644.

O. P. Chandler for defendant.

The written instrument, admitted in evidence, contained all the essential elements of a trust assignment. It properly commences by declaring the indebtedness of the assignors and the purposes of the assignment. Then follows, "we assign and surrender the possession to said Ford, as our assignee." The word "assign" imports, *ex vi termini*, a legal transfer of title, (*Bouvier's Law Dict.* 99; 5 Johns. 390,) and the terms which follow, "we surrender the possession to him as our assignee," in that connection are equivalent to the words *sell and deliver*, and, though perhaps needless, yet they tend to establish clearly the intent and object of the instrument. It

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next declares the purposes of the trust; next is an agreement on Ford's part to execute the provisions of the trust,—which, indeed, he would be bound to do, by receiving the assignment and acting under it; then follows a provision that said Ford should do what a court of chancery would have compelled him to do, to wit, “to render to them an account of his doings.” Now we ask by what construction we are to be held to treat this instrument as merely creating an agency? Not by virtue of the last clause, for by that he is not made accountable for the avails of the property to them,—for that he is directed to pay to the creditors,—but only to render an account of his doings,—which any trustee would be required to do to all those interested in the disposition of the trust funds,—as were Moulton & Hutchinson, in this case, to have their debts paid. Such mere agency cannot be inferred from any other part of the instrument; for, on the contrary, every other part of it expressly contravenes and excludes any such construction.

The opinion of the court was delivered by

BENNETT, J. It appears by the bill of exceptions, that, on the trial of this cause in the county court, several questions were reserved, which it will not be necessary to consider, much less to decide. The property now in question belonged to Messrs. Moulton & Hutchinson, and, immediately before the service of the attachment by the defendant's deputy, the property had been assigned by Moulton, one of the firm, for the payment of certain debts; and this action against the sheriff is grounded upon his neglect of duty, in not keeping the property attached, that it might be taken in execution.

If the assignment, made only by Moulton, which is made a part of the bill of exceptions, is *inoperative* upon its face, the jury did not receive such instructions as should have been given them, and the judgment of the county court must be reversed. I, as an individual member of the court, think that Moulton had no power, as a partner, to make such an assignment *as this*, which can bind the firm.

There is nothing in the case to show, and it is not even pretended, that Hutchinson had in any way assented to, or authorized, the assignment at the time of the attachment, unless his assent is to be

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implied from the partnership. No doubt, one partner may assign partnership property to a creditor of the firm, to secure or pay a partnership debt. This power rests upon the ground of an implied authority to perform such acts, as are incidental to their common business. But to say that one partner has the power to make a general assignment to a trustee, for the benefit of preferred creditors, is quite a different thing. It, in effect, puts an end to the partnership, and transfers the legal title in the property to a trustee, and clothes him with power, as an agent of the firm, to close up the business. This was the object of the present assignment; and, if sustained, such would be its effect. The power to make sale of the partnership effects, and to pay or secure debts by an assignment of the property to a creditor, resides in each partner, as long as the partnership exists; and the power flows from the principle, that each one is the agent of the whole. But his agency extends only to such acts, as are incidental to the carrying on the business of the firm, and not, as I think, to the appointment of a trustee to close up the business, and distribute the proceeds of the partnership effects in unequal proportions among the creditors, and thereby exclude the other partners from participating in the distribution, or in the decision of the question, in regard to what creditors should have a preference, if any.

In *Pierpoint v. Graham*, 4 Wash. C. C. Rep. 232, Judge Washington evidently inclined to the opinion, that one partner had no such inherent authority, arising out of the partnership, as would enable him to assign the partnership effects in such a manner as to terminate the partnership, though he did not find it necessary to express any decided opinion upon the question. In *Hitchcock v. St. John*, 1 Hoffm. Rep. 511, it was held by the Vice Chancellor, that no authority resided in one partner, to make a general assignment to a trustee, giving preferences to particular creditors of the firm. It was considered, that such an assignment superseded all the business of the firm, as such, and took from the control of each of the partners all the property, with which the partnership business was conducted, and was of itself a virtual dissolution of the partnership. The transfer of property by one partner to an acknowledged creditor is within his powers, as incidental to the business of the firm; and this is a power probably necessarily surviving, after a

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dissolution, in whatever way that shall have been brought about. But upon an assignment of the property to a trustee, a complication of duties and powers is involved. One partner thereby appoints an agent to control and dispose of the whole business, of whose integrity, capacity and fitness he alone is the judge. In *Havens v. Hussey*, 5 Paige 30, this point came directly before the Chancellor, and he held that one partner had no such implied authority.

In the case of *Egberts v. Wood*, 3 Paige 317, the assignment was direct to the preferred creditors, in payment of their debts. So in *Mills v. Barber*, 4 Day's Rep. 428, the assignment was direct to a creditor of the firm, to secure the payment of his debt. In the case of *Harrison v. Sterry*, 5 Cranch 289, the complainant claimed title, as assignee, under an assignment executed by Robert Bird, one of the firm of Bird, Savage & Bird, who did business at New York under the firm of *Robert Bird & Co.*, and at London under the firm of *Bird, Savage & Bird*. Robert Bird was the only partner, who resided in this country, and he had necessarily the whole business of the firm in the United States committed to him. The assignment was only of a *certain specific portion* of the partnership property, for the purpose of *raising funds to carry on the business of the firm, and to save their credit*. Though, under the particular circumstances of this case, it was held, that Bird had power to make this assignment, yet this, in my view, is far from holding that an assignment of the whole partnership effects, by one partner, to a trustee, to wind up the business and distribute the avails among preferred creditors, is valid. I understand my brother Redfield fully to concur in the opinion, that Moulton had no implied authority, as a partner, to make the assignment in question; while the other members of the court, now present, are not prepared, at this time, to adopt that opinion.

The assignment is very inartificially drawn; and probably *haste* was somewhat necessary, that it might be prior in time to the attachment. The words are, "we assign and surrender to Samuel Ford, as our assignee, the possession of all the wool," &c. The description of the property intended to be assigned is of the most general character, being "all their wool, cloths, &c., in their factory at Bridgewater and at Woodstock, and all other property, which they owned or possessed in said towns." There is no schedule of

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the property annexed to the assignment, and no estimate of its value. There is no list of the names of the preferred creditors, or schedule of the sums due to them; but they are referred to as being brought under different classes, and designated in general terms. It is to be inferred, from the face of this assignment, that Moulton & Hutchinson were greatly insolvent; and we are to understand it as a general assignment of all their effects. There is no allusion in the assignment to the fact that they were owners of property in other towns, not designed to be embraced in this assignment, and we are not to *intend* it,—and especially, as it appears from the recitals in this assignment, that it was made “to save a great sacrifice and waste of property.”

There is no pretence that this assignment makes a provision for all the creditors of Moulton & Hutchinson. Certain executions, and certain debts, upon which attachments had been issued, and which had been levied upon a portion of the property assigned, were first to be paid, and then the assignment provides, that the residue of the property shall be applied to the paying of *other debts*. The workmen, and such as may have paid them, are first preferred, and then such as may have signed and endorsed notes, as surety for the firm, which were still outstanding, or such as have sold them wool. There is no provision that the *surplus* shall be paid to the general creditors; and though the assignment does not provide that the trustee shall pay the *surplus*, if any, back to the debtors, for their use, still there would be a *resulting trust* for the benefit of the debtors, if this assignment is sustained; and its performance would be equally *imperative* upon the trustee, as if the surplus had been expressly reserved in the assignment.

Though probably the better opinion is, that the want of schedules, annexed to show the particulars of the property assigned, and the names of the creditors, and the amount of debts due them, is not *conclusive evidence of fraud*, so as to render the assignment inoperative upon its face, yet it becomes a more important enquiry, to determine what shall be the effect of a *resulting trust*, apparent upon the face of the instrument, which may enure to the benefit of the debtor, to the expense of the creditors. It has been supposed, that, though a trust be reserved in the deed to the use of the debtor, yet if the deed was not made *intentionally to delay, hinder and defraud*

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creditors, such a reservation would not affect the residue or main purpose of the assignment. The case of *Estwick v. Cailland*, 5 T. R. 420, also *Riggs v. Murray*, 2 Johns. Ch. Rep. 580, and *Murray v. Riggs*, 15 Johns. 571, strongly countenance such a position; but we think such a reservation should have a more decided effect, and that sound policy requires that it should render the whole assignment *fraudulent and void*. This we understand to be according to the later authorities. *Mackie v. Cairns*, 1 Hopkins Rep. 373. *S. C.*, in the Court of Errors, 5 Cowen 566. *Harris v. Sumner*, 2 Pick. 129. *Burd v. Fitzsimons*, 4 Dallas 77. *Passmore v. Eldridge*, 12 Serg. & Rawle 198. The case of *Grover v. Wakeman*, 11 Wend. 187, which was much discussed, goes even farther than this. It was there held, that, to enable a debtor, by an assignment of his property in trust, to prefer one creditor, or a set of creditors, to another, he must devote the *whole* of the property assigned to the payment of his debts, and that the assignment must be unconditional, without any *reservation* for his benefit, or any clause in it, making the preferences to depend upon the preferred creditors executing releases to the debtor of all claims against him. Though, as has been already remarked, there would be but an *implied* trust, in this case, resulting to the debtors, for the surplus, which might remain in the hands of the trustee after the payment of the creditors specified in the assignment, yet its legal effect upon the assignment must be the same as if expressly reserved.

It is no answer to this objection to the validity of the assignment, that, in the end, it turned out that there was not sufficient property assigned to pay the preferred creditors. The objection goes to invalidate and render void the assignment upon its face. If there had been an express reservation of the *surplus*, after payment of preferred creditors, it by no means follows, that there would, in the end, be a surplus. There might be, and this entitles the other creditors to pronounce the assignment *per se fraudulent*, and to act at once accordingly.

If it should be said that the *surplus*, after the payment of the preferred creditors, might be reached by the general creditors, while in the hands of the assignee, by the trustee process, still the effect would be, to effectually lock up the surplus property, until the preferred creditors were paid, and thus materially hinder and delay the

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general creditors in their legal remedies to enforce satisfaction of their debts, and compel them to look to a person, to whom they had not given credit. When a debtor fails, from whatever cause, the *whole* of his property, in moral justice, belongs to his creditors; but there is a class of cases, which permit him to prefer, in payment, such creditors as he shall please, upon a general assignment of all his effects, provided the whole is devoted to his creditors; and this seems to be giving him power enough. But these cases are quite distinguishable from one, in which, as to some creditors, there was no provision, and no attempt to dispose of the *whole* property for the use of creditors, but a reservation of what might be a *surplus* after the payment of certain specified creditors, whether such reservation was express, or resulted to the assignor as an implication of law. In such case the act becomes *fraudulent*, and it is not competent for the debtor to prescribe terms to his creditors; but the law is open to them, and they are allowed the right of pursuing their debtor in the way which the law points out, without any obstruction from such an assignment.

The result is, that, with these views, a majority of the court concur in reversing the judgment of the county court and remanding the cause to that court.



RILEY A. DEMING & Co. v. JOEL LULL.

In an action brought by a creditor against a sheriff, for neglect of duty, in not attaching, as the property of his debtor, certain property designated, in which the defence set up by the sheriff is, that the property did not belong to the debtor, but to a third person, and it appeared, on trial, that such third person had made a conditional sale of the property to the debtor, it was held, that the declarations of the debtor, made while he was in possession of the property, that the property belonged to him, and evidence that these declarations were known to the vendor, and that he, with such knowledge, also affirmed that he had sold the property to the debtor, were not admissible as evidence on the part of the plaintiff.

TRESPASS ON THE CASE against the defendant, as sheriff of Windsor County, for the default of his deputy, Ephraim Ingraham,

Deming et al. v. Lull.

Jr., in not attaching certain property, which he was directed by the plaintiffs to attach, as the property of one John H. Leland, on a writ of attachment in their favor against said Leland. Plea, the general issue, and trial by jury.

On trial the defence set up was, that the property in question did not belong to John H. Leland, but to one Aaron P. Leland, and the evidence, on the part of the defendant, tended to show a conditional sale of the property by Aaron P. Leland to John H. Leland, and, on the part of the plaintiff, that John H. Leland, for about twenty months next succeeding said sale, was in possession of said property, using it in all respects as his own, which was known to Aaron P. Leland.

The plaintiffs then offered evidence tending to prove, that, while John H. Leland was in possession of the property, he publicly and openly called the property his own, and offered to accompany this with evidence that Aaron P. Leland had knowledge of these declarations being made by John H. Leland, and that Aaron P. Leland had himself said, that he had sold the said property to John H. Leland;—all which testimony was objected to by the defendant, and was excluded by the court.

The plaintiffs then offered evidence, tending to show, that, after the property had been delivered by Aaron P. Leland to John H. Leland, and while the same was in the possession of the said John H., Aaron P. Leland said that he had sold the property to John H. Leland, and that he called it said John's property; to which evidence the plaintiff also objected, and it was excluded by the court.

The case, in all other respects, was substantially the same with that of *Hutchinson et al. v. Lull*, ante, page 133.

The jury returned a verdict for the defendant. Exceptions by plaintiffs.

O. Hutchinson for plaintiffs.

L. Adams for defendant.

The opinion of the court was delivered by

HEBARD, J. This action is case against the sheriff, for the neglect of his deputy, in neglecting and refusing to attach certain prop-

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erty on a writ in favor of the plaintiffs against John H. Leland. The defence is, that the property was not liable to be attached as the property of John H. Leland. The *legality* of that defence has been established by repeated decisions; and the principal question, now, is in relation to the admissibility of the sayings of Aaron P. Leland and John H. Leland.

We think that these declarations were inadmissible, in the first place, because they were entirely *immaterial*. They did not tend to prove a different state of facts from those insisted upon by the defendant. It was claimed by him that there was a *conditional* sale of this property by Aaron P. Leland to John H. Leland; and these sayings were not inconsistent with that fact. In the next place, they were the sayings of persons who were disinterested, and who might, therefore, be witnesses;—and that being so, their testimony, under oath, would be better evidence. These sayings were no part of the *res gestæ*. It is not with the possession of personal property, as with real estate.

The case goes upon the ground, that John H. Leland had never any *attachable* interest in the property, and therefore his possession was of no importance.

Judgment affirmed.

REDFIELD, J., dissenting. I understand the court to decide that the declarations of John H. Leland, the purchaser, while in the possession of the property, that he owned it, accompanied with evidence that these declarations were carried home and made known to Aaron P. Leland, and the declarations of Aaron P. Leland himself, that he had sold said property to John H. Leland, and calling it the property of John H. Leland, were not competent evidence to go to the jury.

Now, however unimportant to the real merits of the case an erroneous decision of a question of law, in the county court, may be, I understand the law to be well settled, in this state, that, if exceptions are properly taken at the trial, and the case is brought here, the party is entitled to a new trial as matter of right. *Irish v. Cloyes et al.*, 8 Vt. 30. *Penniman v. Patchin*, 5 Vt. 346. *Blake v. Tucker*, 12 Vt. 39. If, then, it was not error in the county court to reject this evidence, *it would have been error*, if that court

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had *admitted the evidence*. I must consider the decision in this case as involving both propositions.

So far as the practice of the courts is of any avail, I think it must be admitted to have been uniformly against the decision now made. Such evidence has been uniformly received at the *nisi prius* trials; and I never heard its propriety once questioned, until the present determination.

Upon the legal effect of the evidence, it may be viewed, I admit, in two lights.

1. As tending to show, that such a sale, as is claimed by the plaintiffs, was in fact made by Aaron P. Leland to John H. Leland. In this view it is true that the declarations of the parties to the contract, made at a subsequent time, will not prove the *fact* of the contract. But, even in this point of view, as a part of the *res gestæ*, are not the declarations of the parties, in connection with their acts, competent to go to the jury? I take it to be perfectly well settled, that the declarations of John H. Leland, while in possession, of his ownership, are competent to be given in evidence, to characterize his possession. The mere naked fact of possession is, in itself, equivocal. It may be evidence of ownership, of the most conclusive character,—or it may amount to almost nothing, or, indeed, nothing at all. This must depend upon the length of time the possession is continued, and the claim under which it is kept up, and, more than all, upon the *acquiescence* of the former owner. Now the claim of the possessor can only be shown by his declarations, made at the time; and for this purpose these declarations are indispensable to be known to the triers. To shut out the declarations is, virtually, to shut out the fact of possession, as evidence of title,—which is acknowledged to be one of the most important *indicia* of the ownership of chattels. These declarations were *facts* in the case, and, when brought to the knowledge of Aaron P. Leland, the former owner of the chattels, and not contradicted by him, but, as in the present case, acquiesced in and positively re-affirmed, and this continued for the space of twenty months, and until, in the mean time, the property was attached by the creditors of the vendee, would seem to be evidence of a conclusive character, in ordinary cases, to show, either that the title had actually passed to John H. Leland, or, what is equally decisive of this case, that the vendor had inten-

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tionally holden out to the world, that John H. Leland was the owner of the property, and, in faith of these assertions, it had been attached by his creditors. For if the former owner of property stands by, and suffers another to dispose of it as his own, or if he gives out that he has sold it to another, whereby that other gains a false credit, or his creditors are induced to attach the property, I take it to be well settled, that the owner of the property is thereby estopped from asserting his title, to the prejudice of the innocent, *bona fide* purchaser, or attaching creditor. Both these views of the case seem to have been wholly disregarded in the court below; and for these reasons I should grant a new trial.

In my judgment it is not a sufficient answer to this view of the case, that the plaintiff might and should have called Aaron P. Leland, who was a competent witness, to prove his own declarations and how far he acquiesced in the claim of John H. Leland. I have no doubt he *was* a *competent* witness for that purpose,—but not the *only competent witness*. All this might have been as well *known* to other witnesses, as to Aaron P. Leland; and, being *known* to them, the plaintiffs might elect what witnesses they would rely upon. And had the plaintiffs put Aaron P. upon the stand, to prove these facts, if they were irrelevant to the issue, he could not have been examined to them in his direct examination, nor on cross examination, unless in reply to something drawn out by the other party. And if these facts are relevant to the issue, and Aaron P. had first been examined, and had denied them *in toto*, they might still have proved them by *other* witnesses;—much more, then, might they have proved them by other witnesses in the first instance; so that this question must turn upon the point, whether this testimony was competent evidence, either as tending to show a sale in fact, or such conduct on the part of Aaron P., as subjected the goods to attachment.

I know that the fact, that this was, in terms, a conditional sale, tends, in some measure, to explain these declarations, both on the part of the vendor and the vendee;—but how far this explanation was satisfactory, and, in fact, whether the sale was in reality conditional, or whether this, too, might not have been a part of the scheme, designed by the parties to protect the property from attachment, were all questions of fact, to be determined by the jury under proper instructions. The cases of *Carpenter v. Hollister et al.*, 13

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Vt. 552, and *Hines v. Soule*, 14 Vt. 99, have been supposed to settle this case; but I do not so understand those cases. In *Carpenter v. Hollister*, it is expressly declared, that the declarations of the grantor of land, made while he was in the possession of it, are competent evidence to show the nature and extent of his possession, and that beyond that they are not evidence to defeat the *title of record*. And it was upon this ground, mainly, that the case was put by the court. In the case of *Hines v. Soule* the authorities are very extensively reviewed by Judge Bennett, and it is very clearly shown there, that the declarations of the possessor of personal property are competent to be given in evidence, for the purpose of qualifying and limiting his possession. But the admissions in that case were offered for the purpose of *defeating the effect of a formal sale and long continued possession*, and were intended to operate as *admissions* merely, and were so received and acted upon by the jury. In this view they were improperly received, and for this reason a new trial was granted. But if that case is to be understood as deciding that *no declaration of any one* can be shown by *another person's testimony*, when he is himself a competent witness in the case, it goes farther than any other case has gone, and farther than any case ought to go, and farther than the court intended,—as is evident from Judge Bennett's written opinion. My own opinion, in regard to this point in the case, is fully declared in *Beecher v. Parmelee et al.*, 9 Vt. 356-7. I think, therefore, in strictness, the testimony was admissible, and should have been received; and for that reason I should grant a new trial, in order to prevent this decision being drawn in precedent.



SIMON LELAND, Adm'r *de bonis non* of LOVEL GASSETT, v. DARIUS GASSETT.

Buildings, erected for a temporary use, or barns, erected by persons other than the owner, and not intended for permanent fixtures, may, in some cases, be considered and treated as personal property; but, as between vendor and vendee, heir and executor, mortgagor and mortgagee, all buildings which enhance the value of the estate, and are designed to be occupied by the owner thereof, agreeable to the principles of the common law, become a part of the realty, and pass with it by deed, or by descent.

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Where a father permitted his son to enter upon a farm belonging to the father, and make improvements and erections, and carry on the same for his own-use and benefit, promising him that he would, at some time thereafter, give to him a deed of the farm, and the son went on and, at his own expense, erected a house and barn upon the premises, and, after carrying on the premises for some years for his own benefit, died, and the father refused to convey to the administrator of the son the farm, or to permit him to occupy the buildings where they stood, or to remove them from the premises, and the jury, under the charge of the court, must have found that the buildings were erected with a view to their being permanent, and remaining on the land, and being occupied by the son as part of the estate to be decded to him thereafter, it was held that the buildings became a part of the realty, and could not be considered as personal estate for which the father could be made accountable in an action of trover brought by the son's administrator.

TROVER for a house and barn. Plea the general issue and trial by jury.

On trial, the plaintiff, to sustain the issue on his part, gave evidence tending to prove, that, in the year 1828, the defendant agreed with his son, Lovell Gassett, the deceased, that said Lovell might go on to a portion of the defendant's land, erect buildings thereon, and occupy the same, and clear up and improve the land, to his own use, and that the defendant would sometime thereafter give said Lovell a deed of the same land; that said Lovell entered upon the land, and, taking timber growing thereon, did, with his own means, cause the house and barn, for which this action was brought, to be erected, and went into the use and occupancy of said buildings, and cleared up and improved said land, and lived thereon, taking the products thereof to his own use, until his death in 1833; and that in 1839, and after the first administrator had closed his administration, the plaintiff demanded of the defendant permission to occupy said buildings, to remove the same, on payment of the value of them; all of which the defendant refused.

The defendant gave evidence tending to prove that said Lovell, who came of age in 1821, was of feeble health, and lived in the defendant's family until 1828, and had little or no property of his own; that in 1828 the defendant agreed with said Lovell, that he might go upon said land and build, and occupy and improve the buildings and land to his own use, and occupy and improve as long as he

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pleased, or leave the premises when he pleased, and that the defendant would help him build; that said Lovell accordingly went upon the land, took the timber thereon standing, and, with some aid afforded by the defendant in materials, money and labor, procured said house and barn to be erected, and from thence to the time of his death occupied and used the premises as aforesaid; that said house was placed upon a cellar, dug and stoned in the customary manner of constructing dwelling houses, and had a stack of chimneys laid on a stone foundation, and that the barn was built in the ordinary manner of building barns; and that said buildings remained in the same situation, as when erected, at the time of said alleged conversion.

The defendant's counsel requested the court to charge the jury,—

- 1st. That if said house and barn were standing on the defendant's land, in the same situation as when erected, when the demand was made, the plaintiff could not recover.
- 2nd. If Lovell Gassett went into possession of the defendant's premises, and took timber then standing and growing on said premises, and converted it into said house and barn, and said house and barn were standing on said premises, in the same situation as when erected, when the demand was made the plaintiff could not recover.
- 3rd. If the jury found that the defendant contributed of his own means and materials towards the erection of said buildings, then, unless they also found that the defendant made a gift to his son Lovell of all the defendant so contributed, the plaintiff ought not to recover.
- 4th. That, if the jury found the defendant owned the land whereon the buildings stood, and that he contributed of his own means and materials towards the erection of said buildings, then, there being no contract in writing between the defendant and his son relative to any interest in the land in favor of the son, the plaintiff ought not to recover.
- 5th. That, on all the evidence in the case, the action of trover could not be sustained, and the jury should return a verdict for the defendant.

The court refused to charge the jury as requested; but did charge them, that, if they found from the proof that Lovell Gassett erected the buildings in question on the defendant's land, by his permission, under an agreement that the defendant would deed him the land on which they stood, or, if the jury found that said buildings

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were erected on the defendants land, by the said Lovell, under and pursuant to an arrangement and agreement, between the said Lovell and the defendant, that the said Lovell should occupy them upon the land where they stood, and the said Lovell did occupy them until his death, without any abandonment on his part, in either case the buildings became the property of said Lovell; and that, if the defendant had refused to permit the plaintiff, since the decease of said Lovell, either to occupy the buildings where they stand, or to move them from the defendant's land, the plaintiff was entitled to recover the value of the buildings at the time of the refusal and the interest to the time of trial; and that this value must be understood to be what the buildings were worth to remove.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

C. Coolidge and *S. Fullam* for defendant.

1. The plain and obvious question, presented by the exceptions in this case, is this; can an action of trover be sustained for real estate, of which a plaintiff has been unjustly kept out of the possession? If the testimony tended to show that the house and barn were real estate, and attached to the defendant's freehold, he was entitled to a charge as specified in his 1st, 2d and 4th requests.

2. Trover cannot be sustained for what is fixed to the freehold. 1 Swift's Dig. 534. 3 Arch. Blackstone 149. 2 Wheatons, Selwyn 1057. *Nelson v. Burt*, 15 Mass. 204.

3. If Lovell Gassett had any interest in the house and barn, it was an interest in real estate, and he was a tenant at will of the defendant. Rev. St. 314, § 21.

4. If an action of trover can be maintained at all, it can be maintained against any person in possession of the property, who refuses to deliver it up to the owner, when demanded. Now in case the defendant had sold and deeded this property, would any one pretend that an action of trover could be maintained against his grantee?

5. If the buildings were personal property, (which we deny,) and the defendant furnished a part of the materials and assisted in their erection, as the testimony tended to show, he was entitled to a charge in accordance with his third request.

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6. If all the testimony in the case showed that the buildings were attached to the freehold, the defendant was entitled to a charge in accordance with his fifth request.

7. Lovell Gassett took the defendant's trees and converted them into buildings and affixed them to the defendant's freehold; the defendant had the *legal title* to the buildings;—can *trover* be sustained against the legal owner?

P. T. Washburn and *D. Kellogg* for plaintiff.

1. The fact is established by the verdict that Lovell Gassett *erected the buildings*. This disposes of the defendant's third request to the court, and of so much of his second and fourth requests as refers to the *assistance* rendered by the defendant.

2. The remainder of the defendant's second request and his first and fifth are synonymous, amounting to this,—can *trover* be sustained in the case?

3. The *facts*, established by the verdict, are,—1, The property in the buildings was in Lovell Gassett;—2, They were erected by *permission* of the defendant;—3, There has been no abandonment on the part of Lovell;—4, The defendant has converted them to his own use. The permission to build was accompanied by an *agreement*, either that the defendant would *give* Lovell a *deed* of the land, or would permit him to *occupy* the buildings where they stood. Either way, this action is rightly brought.

The *foundation* of our right is to be found in the ancient rule between landlord and tenant. That was, "Where a lessee, having annexed any thing to the freehold during the term, afterwards removed it, it was *waste*." LD. ELLENBOROUGH, in *Elwes v. Maw*, 3 East 38. Year Book, 17 Edw. 2, cited in *Ib.* Note to *Herlaken-den's Case*, 4 Co. 64 a. *Cooke v. Humphrey*, Moore 177. Hob. 234. STORY, J., in *Van Ness v. Pacard*, 2 Pet. 146. The strictness of this principle subsequently yielded to the doctrine, that a tenant might remove fixtures erected for the benefit of trade. *Pool's Case*, Salk. 368, (1703.) *Lawton v. Lawton*, 3 Atk. 13, (1743.) *Ld. Dudley v. Ld. Warde*, Ambl. 113, (1751.) *Lawton v. Salmon*, 1 H. Bl. 259 (n.) (1781.) *Dean v. Allaley*, 3 Esp. R. 11, (1799.) *Penton v. Robart*, 2 East 88, (1801.) But in *Elwes v. Maw*, 3 East 38, (1802) the application of the principle was *limited* strictly to erections for *trade*,—not *agricultural* erections.

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The American cases, carrying out this principle, commence with *Holmes v. Tremper*, 20 Johns. 29, where it was held that a cider mill and press were not fixtures, and that it was immaterial whether they were let into the ground or not. In *Van Ness v. Pacard*, 2 Peters, 146, the same rule was applied to a two story dwelling house, having a cellar and chimney, and it was held that the *form, size, materials and mode of building* were immaterial, and it was denied that the case of *Elwes v. Maw* was authority in this country. And see *Miller v. Baker*, 1 Metc. 27.

Then came the application of the principle to cases of *quasi tenancy*,—as where *permission* had been given to build on another's land. Thus in *Doty v. Gorham et al.*, 5 Pick. 487, a shop, which the owner had moved on to the plaintiff's land, and occupied there by his permission, was held personal property. In *Russell v. Richards*, 1 Fairf. 429, A., owning a mill privilege, gave B. and C. permission to build a saw mill thereon,—they having bargained *by parol* for the purchase of the land. The mill was subsequently sold on execution as the *personal property* of B. and C. A. was then in possession of the land, and of the mill upon it, for about three years, and then sold the land to D. by deed with warranty; and it was held, in an action of *trover*, brought for the mill, that the mill never became part of the *freehold*, and did not pass by the deed; and the same case was again considered, 2 Fairf. 376, with direct reference to the form of the action, and it was held that *trover* would lie. And in *Hilborne v. Brown et al.*, 3 Fairf. 162, *trover* was sustained for a *blacksmith's shop*, built on land by *permission* of the owner; it was built on stone posts, and the forge was built on the ground.

And from these cases the doctrine has been established, that courts will not, at the present day, be governed by the strictness of the ancient principle,—but, in every case, by the *situation* of the parties, and their *intention*, as manifested by their acts, and their *equitable rights* resulting therefrom. Thus in *Marcy v. Darling*, 8 Pick. 283, a building on piles, driven below low water mark, was held personal property. In *Wells et al. v. Bannister & Tr.*, 4 Mass. 514, a house, barn, &c., built by a *son* on his *father's* land, by permission, were held personal property.

The case of *Osgood v. Howard*, 6 Greenl. 452, was one *identical* with the present. There the defendant had permitted his *son* "to

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occupy the land, by whom the buildings, (a house, barn and shop) were erected with the consent and assistance of the defendant." The son died, and his administrator sold the buildings to the plaintiff; and it was held that the plaintiff might maintain *trover* against the father for the buildings, which the father had converted to his own use. And in *Barnes v. Barnes*, 6 Vt. 368, a school house, placed upon land by permission of the owner, was held personal property.

But if the other branch be taken to have been found by the jury,—that permission was given to build, under an agreement that Lovell Gassett might occupy the buildings where they stood,—the plaintiff's right to recover is equally clear. *Winter v. Brockwell*, 8 East. 309. *Webb v. Paternoster*, Palmer 71, cited in *Ib*.

At all events, the barn is personal property. In *King v. Otley*, 20 E. C. L. 368, a windmill, resting on the ground, was held personal property. So was a barn, resting on blocks and pattens, in *B. N. P. 34*. And in *Wansbrough et al. v. Maton*, 4 Ad. & El. 664, (31 E. C. L. 317,) *trover* was sustained for a barn, erected on a foundation of brick and stone, the foundation being let into the ground.

4. The defendant's fourth request was not warranted. It is not necessary to show any written memorandum of the agreement. Lovell Gassett did not bargain for any interest in land, nor do we now claim to recover such interest. 7 N. H. Rep. 237. 1 Fairf. 429. 3 Fairf. 162. And again, the agreement having been performed on the part of the plaintiff, the defendant cannot set up the want of such agreement; *Winter v. Brockwell*, 8 East 309 (n.); *Philbrook v. Belknap*, 6 Vt. 368; *Woodbury v. Parshley*, 7 N. H. Rep. 237; in which last case it was held that a *privilege*, to be exercised upon land, was not within the statute.

The opinion of the court was delivered by

WILLIAMS, CH. J. The question presented in this case is, whether the house and barn, for which the recovery was had in the county court, were personal property; for, unless they are to be so considered, the action of *trover* cannot be maintained. It is conceded, that the action cannot be maintained to recover the value of fixtures. Buildings, when erected for the use and convenience of

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the owner of the soil, become a part of, and annexed to, the realty, and pass by a deed from the owner of the soil, and descend to the heir as part of the inheritance. It will not be contended, that, by virtue of an execution, the sheriff can seize and sell as personal property the houses, barns, or other buildings, erected by, and in the occupancy of, the owner of the soil. In most of the cases, which have been read, it is recognised that a house with a chimney and cellar becomes a part of the realty, and is to be treated as a tenement, particularly when erected with a view to its being permanently occupied for that purpose. This was conceded in the case of *Van Ness v. Pacard*, 2 Peters 137; and, indeed, the case of *Ehlers v. Mao*, 3 East 83, seems to settle this point beyond controversy. It is undoubtedly true, that buildings, erected for a temporary use, or barns, erected by persons other than the owner, and not intended for permanent fixtures, may in some cases be considered as personal property, and treated as such.

Between vendor and vendee, heir and executor, mortgagor and mortgagee, all buildings, which enhance the value of the estate, and are designed to be occupied by the owner thereof, agreeable to the principles of the common law, become a part of the realty and pass with it by deed, or by descent. The decision of this court in the case of *Preston v. Briggs*, 16 Vt. 124, recognised and established this principle in relation to a barn, erected by a mortgagor, remaining on the premises at the time of the foreclosure; and the same was recognised in Massachusetts in the case of *Winslow v. Merchants Ins. Co.*, 4 Met. 306, and *Butler, Adm'r, v. Page*, 7 Metcalf 40.

In the case before us the buildings were erected with a view to their being permanent and remaining on the land, and being occupied by the plaintiffs intestate, as a part of the estate to be deeded to him thereafter. The charge of the court supposes this to be the state of the facts. We are, therefore, all of us of opinion, that, by the rules of the common law, the house and barn, erected by the intestate under the circumstances detailed in the bill of exceptions, became a part of the realty, and cannot be considered as personal estate, for which the defendant can be made accountable in an action of trover.

It is true that the rule of the common law has been relaxed in

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favor of tenants, in cases arising between landlord and tenant, and between the executor of the tenant for life and the remainder man, so far as to permit them to retain the property and remove buildings, erected for the purpose of trade; and perhaps in this country the observations of the court in the case of *Van Ness v. Pacard*, 2 Peters 146, would extend this exception to buildings erected for agricultural purposes by the tenant. And in England, where the buildings were erected with a design to remove them, and where by custom the tenant usually removed such buildings or had them valued to the incoming tenants, a tenant has been permitted to maintain an action of trover against a party converting them; such was the case of *Wansbrough et al. v. Watson*, 4 Ad. and Ellis 384, (31 E. C. L. 217;) although this latter case seems to be somewhat at variance with the remarks of Ch. J. Gibbs in *Lee v. Risdon*, 2 E. C. L. 69, and which always appeared to me well founded;—yet these cases do not help the plaintiff. They are exceptions to the general rule, and the plaintiff must bring his case within those exceptions, or he cannot prevail.

We are aware that there are some cases in Massachusetts and in Maine which would seem to countenance the views urged by the plaintiff. The case in the 4th Mass. 514, *Wells et al. v. Banister and his trustee*, does not appear to me to warrant the conclusions which have been drawn from it in the other cases. The remark that the house was "the personal property of the son" does not appear to me to be a legitimate conclusion from the facts disclosed in the case, but the reverse; and, although the decision was sound and correct, yet the inference, which was drawn from it in subsequent cases, does not appear to me to be legitimate. The case of *Benedict v. Benedict*, 5 Day 464, established a different principle, and, in my view, a more correct one.

The legal title to the house and barn in the case before us is in the defendant, and if the plaintiff has any remedy, it must be in chancery, as was considered in the case of *Benedict v. Benedict*.

The judgment of the county court is therefore reversed.

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JOHN S. WILLARD v. JOEL LULL.

Where a sleigh, in an unfinished state, was in the shop of a painter, who was to finish it by a time specified, and the owner of the sleigh went to the shop with the plaintiff and there sold the sleigh to the plaintiff at a price agreed upon, and no payment was made, and the sleigh was not then actually delivered to the plaintiff, but it was agreed that the sleigh, when finished, should be delivered to the plaintiff, and the painter, who was present, was directed to deliver the sleigh, when finished, to the plaintiff, and agreed to do so, it was held that the plaintiff might maintain trespass against the defendant, a sheriff, who attached and took away the sleigh, before it was finished, upon a writ of attachment against the vendor.

TRESPASS for taking and carrying away a sleigh; the action came into the county court by appeal from a justice of the peace. Plea, the general issue, and trial by jury.

On trial, the plaintiff introduced testimony, which was not contradicted by the defendant, and which tended to prove the following facts. On Saturday, January 23, 1841, the sleigh in question was in the shop of one Ira Ayres, in Hartland, in the process of painting, having been left there for that purpose by Ed. Willard, the owner. Ayres had agreed to paint and varnish the sleigh for said Willard, and had, at that time, completed all but the varnishing. On said Saturday the plaintiff and Ed. Willard came together to Ayres' shop, where the sleigh was, and Ed. Willard then agreed to sell, and the plaintiff to purchase the sleigh, at a price agreed upon. No payment was made by the plaintiff, nor was the sleigh actually delivered; but it was agreed, that, when the sleigh was varnished, it was to be delivered to the plaintiff. Ayres was present at the time of the trade, and was directed to deliver the sleigh, when it was finished, to the plaintiff, and agreed to do so, and have it finished the then next Monday. There was no other proof of any delivery.

On the Monday next following, (being January 25th,) the defendant, as sheriff, went to Ayres' shop and attached the sleigh, as Ed. Willard's property, on a writ which he then held against him, and appointed Ayres keeper for him, and directed him to let no one have the sleigh, but to inform all that it was under said attachment; and Ayres agreed to do so, but at the same time informed the defendant that

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the plaintiff had purchased the sleigh. On the next day, Tuesday, Ayres informed the plaintiff of the attachment; and afterwards, on the same day, the plaintiff and Ed. Willard came to the shop,—Ayres being out, and his hired man being at work upon the sleigh,—and drew the sleigh out upon the platform of the shop, and talked of going to the blacksmith's shop for some irons; when the hired man of Ayres told them that they had better put the sleigh back into the shop,—and they did so. Immediately after, the defendant came in, and said to the plaintiff, who was then sitting upon the sleigh and had hold of it, "I understand you are going to take away my sleigh." The plaintiff replied, claiming the sleigh as his own. The defendant claimed it by virtue of the attachment, and forcibly took it from the plaintiff and drew it away.

The defendant's counsel requested the court to instruct the jury, that the plaintiff's testimony did not show a sale, completed by delivery, or possession, sufficient to entitle the plaintiff to recover in this action. But the court refused so to charge, but directed the jury to return a verdict for the plaintiff for the value of the sleigh. Exceptions by defendant.

E. Hutchinson for defendant.

The defendant was entitled to the instructions asked for below, in two points of view. First, The plaintiff's proofs did not entitle him to maintain *trespass* as against a stranger. Secondly, The plaintiff's claim is that of a pretended purchaser against an attaching creditor of his vendor. And the objection to the plaintiff's right to recover is, in either view of the case, perfectly good, upon authority, under the general issue.

1. The plaintiff, to maintain this action, was bound to show that, at the time of the taking complained of in his declaration, he had either the actual, or constructive, *possession* of the sleigh, and had also either a general, or qualified, *property* therein. If any authority is necessary, we cite *Brainard et al. v. Burton et al.*, 5 Vt. 98. Whereas the facts in the case show in him no such possession, nor property. The taking by the defendant, (or trespass, if such it was,) was on Monday the 25th day of January. Immediately upon the seizure, on that day, and the appointing of the keeper, the possession was, in law, in the defendant, as sheriff. He be-

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came immediately thereupon liable to an action of trespass, had he acted without authority, and could from that moment have maintained trespass for any illegal interference with his possession. Up to that time the general property, as well as the constructive possession, was in Ed. Willard. The plaintiff had not even a qualified property in the sleigh, and had never had possession. Treating the transaction as *bona fide*, it was a mere executory contract for a thing unfinished and in the process of manufacture, before it had existence in the form, in which it was contracted to be delivered, and "when nothing passes by the contract until it has such existence and is *actually delivered*." *Mucklow et al. v. Mangles*, 1 Taunt. 319. *Brainard et al v. Burton et al.*, 5 Vt. 99.

In the present case it was not left to implication, but, by the *express* terms of the contract, no delivery was to be made until after the sleigh should be completed. It was not completed, when attached; consequently the time had never arrived, when the plaintiff was entitled to take possession. Having had, therefore, no property, nor possession, nor right of possession, at the time of the taking, the plaintiff cannot maintain trespass, even as against one acting without pretence of authority.

2. But more especially do the plaintiff's proofs fall short of sustaining this action, when his claim is viewed as in opposition to that of an attaching creditor of his pretended vendor. And that view of the case is proper, upon the proofs put in, notwithstanding there is no plea but the general issue. In trespass a defendant "is not obliged to justify specially unless he is *prima facie* a trespasser." *Badkin v. Powell*, Cowper 478. The taking was not from the plaintiff's actual possession;—therefore, *prima facie*, no trespass upon him;—which drives him to prove *property* in himself. And it is an invariable rule, that a defendant, under the general issue, may *disprove* any and all facts, which the plaintiff is bound to prove, to maintain his action. *Brainard et al. v. Burton et al.*, 5 Vt. 100. *Merritt v. Miller*, 13 Vt. 418.

The taking, then, is to be regarded as having been by virtue of process;—and, viewed in that light, the case does not fall at all within the principles of the decision in *Barney v. Brown*, 2 Vt. 377. There "every thing was done which was necessary to complete the sale and vest the property in the plaintiff." In that case

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the plaintiff paid a valuable consideration;—the property was in existence, in a finished state, susceptible of immediate delivery;—by the terms of the contract it was to be delivered forthwith;—there was a delivery in fact,—for the person, in whose keeping the sheep were, was directed and agreed to, and did in fact, select and mark and commence keeping them solely and exclusively for the purchaser, before the attachment;—in short, nothing remained to be done, in order to divest the vendor of all property and possession, and to vest the whole property and legal possession in the purchaser. In the present case, “something remained to be done on the part of the seller, as between him and the buyer, before the commodity purchased was to be delivered;—and a complete present right of property had not attached in the buyer.”—See *Hanson et al. v. Meyer*, 6 East. 614. No consideration was paid, and no term of credit was agreed upon. Ed. Willard could have rescinded the pretended contract at any time before the sleigh was finished and delivered, for the non-payment of the purchase money, or the insolvency of the plaintiff. *Wallace v. Breeds*, 13 East. 522. *Shepley v. Davis*, 5 Taunt. 621. Had the sleigh been destroyed by fire, or other casualty, at the time of the attachment, it would, even as between the plaintiff and Ed. Willard, have been held “no delivery,”—and the plaintiff would not have been, in law, responsible to him for the stipulated price,—but the loss would have been Ed. Willard's. *Rapelye v. Mackie*, 6 Cow. per WOODWORTH, J., 253-4. Much less can the sale, (even if *bona fide*,) be regarded as complete, as against an attaching creditor of Ed. Willard's, within the principles of any decision in this state.

Tracy & Converse for plaintiff.

1. It can hardly be pretended but that the property in the sleigh became vested in the plaintiff immediately upon the purchase. It was at his risk. The vendor could sue for and recover the pay immediately upon the sale. Ayres was to deliver the sleigh as soon as it was varnished, to which he assented. Can there be any doubt who should bring the suit, in case Ayres should have converted the property? 1 Swift's Dig. 380. *Whithouse v. Frost*, 12 East 613. *Lucas v. Dorrien*, 7 Taunt. 278. *Barney v. Brown*, 2 Vt. 374. *Harding v. Janes*, 4 Vt 462. *Chappel v. Marvin*, 2 Aik. 79.

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2. But it is insisted that there is not such a delivery in this case, as to protect it from attachment by the creditors of the vendor. This question, we contend, is fully settled, in this state, by several adjudged cases. *Barney v. Brown*, 2 Vt. 374. *Harding v. Janes*, 4 Vt. 462. *Spalding v. Austin*, 2 Vt. 555. *Pierce v. Chipman*, 8 Vt. 334.

The opinion of the court was delivered by

WILLIAMS, Ch. J. The only question in this case is, whether the sleigh became the property of the present plaintiff; as there is no question made as to any actual fraud between the plaintiff and Ed. Willard. We think that the contract between the plaintiff and Ed. Willard was complete and perfected at the shop of Ayres, on the 23d day of January, that the property then passed to the plaintiff, and that Ed. Willard was entitled to the price as soon as the painting was finished. All that was to be done thereafter was to be done by Ayres, and nothing by Ed. Willard. The case of *Tilden v. Brown*, 14 Vt. 164, was much considered, all the authorities which have been read in this case were then examined, and the result to which the court arrived must govern the case.

In relation to possession, the direction to Ayres and his agreement constituted him the agent for the plaintiff, and his possession was the plaintiff's possession, and, according to the principle established in relation to the sale of property in possession of a third person, who is notified and agrees to keep the same for the vendee, this sleigh was not liable to be attached for the debts of Ed. Willard. When the defendant attached the sleigh, he still left it in the custody of Ayres, and his directions to Ayres could not, by a *quasi* attornment, change the character in which he held the sleigh, as bailee of the plaintiff, to a bailee of the defendant. The plaintiff actually had the custody and possession of the sleigh, when it was forcibly taken from him by the defendant. It appears to us, therefore, that the plaintiff had a perfect title to the property in dispute, by sale, by delivery, and by actual possession.

The judgment of the county court is therefore affirmed.

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SOLOMON DOWNER v. JOHN L. BOWMAN AND PHILANDER BROWN.

Where the plaintiff, in an action of ejectment, proved that he had good title to the demanded premises, as against the defendants, who were strangers in possession of the premises, and, after the testimony on the part of the plaintiff was closed, and during a recess taken by the court, the defendants procured and put upon record an assignment to themselves of an outstanding mortgage of the premises, executed by the grantor of the plaintiff to a third person, which had become absolute through non-performance of the condition thereof, and the plaintiff thereupon, before the trial was resumed, tendered to the defendants the amount due upon said mortgage, and brought the money into court, and, after the mortgage deed and assignment had been given in evidence by the defendants, offered to prove the fact of the tender, it was held that that evidence should be received by the court, and that the effect of the tender was to deprive the defendants of the right to defend under the mortgage deed.

EJECTMENT for land in Royalton. Plea, the general issue, and trial by jury.

On the trial it appeared, on the part of the plaintiff, that, on the 26th day of November, 1834, the premises demanded were owned and possessed by William Hatch, and that he afterwards conveyed the same to Joseph Blanchard, by deed dated June 9, 1838, and that said Blanchard afterwards conveyed the same to the plaintiff, by deed dated May 18, 1841; and it appeared that the defendants were in possession of the premises at the time of the service of this writ.

The trial commenced on Monday, the 29th day of May, 1843, and when the evidence on the part of the plaintiff, above detailed, was closed, the court took a recess until the next morning. At the opening of the court, the next morning, the defendants offered in evidence a mortgage deed of the premises in question, executed by the said William Hatch to John Marshall on the 26th day of November, 1834, and also the note, for the security of which said mortgage was given, and also an assignment of the said mortgage from the said Marshall to the defendant Bowman, dated the 29th day of May, 1843, and recorded the said 30th day of May, 1843, at two o'clock A. M. The said mortgage was given to secure a note payable by instalments, and all the instalments, which had become due prior to the commencement of this action, had been paid and

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indorsed upon the note. The plaintiff then offered evidence tending to prove, that, on the morning of said 30th day of May, 1843, before the opening of the court, he tendered to the said Bowman the full amount of all that was due on said mortgage, and that said Bowman refused to receive the same; and the money tendered was, by the plaintiff, brought into court. To the admission of this testimony the defendants objected, and it was excluded by the court; to which decision the plaintiff excepted. The jury, under the instruction of the court, returned a verdict for the defendants.

The court declined to hear any argument in the case.

The opinion of the court was delivered by

WILLIAMS, Ch. J. We do not incline to hear any argument in this case, as it was virtually decided, during the present circuit, in Rutland County, in the case of *McDaniels v. Reed et al.** The decision in that case was, that a tender of the amount due on a mortgage, after suit commenced, with all the cost which had accrued, was a bar to the plaintiff's maintaining the action of ejectment to recover thereon. The principle, on which that case was decided, operates very strongly in the present case. At the commencement of this suit the plaintiff had an unquestionable title, and a right to the possession,—the condition of the mortgage deed to Marshall not being then broken, and the defendants strangers to the title. At the time the court took a recess, the plaintiff had made out a good case against the defendants; and by the tender, which the plaintiff made on the 30th of May, in the morning, he cut down any defence, which the defendants could make under the mortgage to Marshall and the assignment from Marshall to Bowman. The expedition of the defendants, in procuring the assignment from Marshall and putting it on record, was of no avail to them, as the plaintiff was equally expeditious in taking the proper measures to lay it out of the case. The evidence of the tender should have been admitted. The judgment of the county court is therefore reversed.

J. Barrett and J. S. Marcy for plaintiff.

Tracy & Converse for defendants.

*That case was received by the Reporter too late for insertion in its proper order, and it is reported on a subsequent page of this volume.

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JOSEPH GRAY v. MOSES PINGRY.

When there is a plea of *non tuel record* in a case, the issue upon it can only be tried by the court; and if there is also an issue to the jury in the case, the issue to the court should be first tried.

The greatest strictness is required in pleading estoppels. Every fact, necessary to create the estoppel, must be alleged with the strictest certainty, and it must be alleged that all these facts appear by the record, which is vouched as an estoppel, and the plea should conclude by relying upon the estoppel. But if the matter of estoppel is pleaded merely as a plea in bar, and the plea is not demurred to, the court will consider it as sufficiently pleaded.

The form of pleading an estoppel in *Shelley v. Wright*, Willes 9, approved.

When a former adjudication is relied upon as having determined the entire merits of the controversy now in hand, it need not be pleaded as an estoppel, but is an equitable defence, and, in many actions, may be given in evidence under the general issue, and, when required to be pleaded in bar, is not required to be pleaded with greater strictness than any other plea in bar. REDFIELD, J.

But when the former trial is relied upon as settling some collateral fact, involved in the present controversy, it must, to be conclusive, be pleaded strictly as an estoppel, and the record vouched in support of the plea must contain, upon its face, evidence that the particular fact was in issue, and was found by the triers. REDFIELD, J.

And if such fact do not appear, by the record, to have been distinctly put in issue, and it becomes necessary to resort to oral evidence to show that it was involved in that controversy, the matter cannot be pleaded as an estoppel, but it becomes a subject for the jury to pass upon;—but, if it is proved that the fact was decided in the former controversy, that decision is binding upon the parties, and, of course, upon the jury. REDFIELD, J.

But if the former recovery, relied upon as a defence by plea in bar, was in reference to the same subject matter, now involved, was between the same parties, and the fact relied upon now was then put distinctly in issue, and was found by the triers, and this appears by the record, and no exception is taken to the form of pleading the estoppel, the estoppel is conclusive, notwithstanding there may be some formal differences between the present and former action.

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THIS was a complaint for forcible detainer, under chapter 41, sections 15 and 16, of the Revised Statutes, and came to the county court by appeal from the decision of a justice of the peace. The complainant alleged, that, on the 11th day of May, 1839, he was seized of certain premises in Woodstock, describing them, and that on that day he leased the same premises, by written lease, to the defendant, for the term of eleven months from the 15th day of May, 1839, viz. to the 15th day of April, 1840, and that the defendant, on the 15th day of May, 1839, entered into possession of the premises, and that he wrongfully continued such possession, and refused, and still did, at the time of making the complaint, refuse, to quit the possession, although the complainant had, on the 24th day of June, 1841, demanded possession of the premises, in writing. The complaint was dated August 10, 1841.

The defendant pleaded the general issue, and also a plea in bar in these words;—"And for farther plea in this behalf, by leave, &c., the defendant says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that a judgment was rendered for the same cause of action, before the commencement of this suit, to wit, at the term of the county court begun and held at Woodstock, within and for the county of Windsor, on the last Tuesday of May, A. D. 1841; a record whereof remains in the county clerk's office; and this the defendant is ready to verify by the said record. Wherefore he prays judgment," &c. The defendant also pleaded, that, after the expiration of the written lease, he continued in possession of the premises by virtue of a lease by parol from the complainant for one year from the 15th day of April 1840, and that, for that time, no written lease ever existed.

To the first plea in bar of the defendant the complainant replied *nul tiel record*; the second plea in bar was traversed, and issue thereon was joined to the jury.

On trial the defendant abandoned his plea of the general issue, and, in support of his second plea in bar, he gave in evidence the record of a judgment in his favor, rendered by the Windsor county court, at their May Term, 1841, upon a complaint against him by the present complainant, which was identical, in its terms, with the complaint in the present case, except that the complaint in that case

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bore date September 29, 1840, and counted upon a detainer to that time, and alleged that the demand, in writing, of the possession of the premises was made May 21, 1840. It farther appeared, from the record in that case, that the trial was had upon an issue precisely similar to that joined in this case upon the defendant's second plea in bar, and that that issue was determined in favor of the defendant.

The county court decided that there was such a record as was set forth in the defendant's first plea in bar, and directed the jury to return a verdict in favor of the defendant. Exceptions by plaintiff.

Tracy & Converse for plaintiff.

In order to make the former judgment a bar, it must be for the same subject matter, decided upon the same point, sustained by the same proof, and embracing the same identical cause of action, and no other cause, and no part of any other cause, than the same which it seeks to bar. If the case, to which the estoppel is pleaded, contains any other matter, or thing, which could give the plaintiff any farther damages, and contains circumstances, or facts, different at all from the former judgment, the estoppel will not apply. 1 Stark. Ev. 198, 199. 2 Bl. Com. 827. 3 Wils. 304. 6 T. R. 607. 12 Johns. 313. 16 Johns. 136. 4 Conn. 276.

In this case the judgment pleaded was upon a complaint for holding over after the expiration of the eleven months, which expired April 15, 1840; and the recovery was defeated, on the ground that the plaintiff had, by parol, continued the lease one year longer. That suit was commenced Sept. 29, 1840, and before the year expired. The present action, it is true, counts upon the lease of 1839; but the complaint is, that the defendant held over from the expiration of that lease, viz. from April, 15, 1840, to the commencement of this suit,—which was Aug. 11, 1841,—and that notice to quit was given to the defendant June 21, 1841. Now most surely the former judgment could not cover any thing beyond the year next succeeding the 15th of April, 1840; for there was no pretence that the renewal of the lease was for any more than one year. It was, then, most manifestly, a wrongful holding over, after

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the 15th of April, 1841; and that question had not been passed upon in the former case, as the former suit was commenced in September, 1840.

J. Barrett for defendant.

The only issue to the jury, on the first suit, was, whether the premises were let to the defendant by parol, for the year next succeeding April 15, 1840. On this issue the jury returned a verdict for the defendant. That same issue is made under the second plea in bar in this suit, and is the only issue to the jury. Whatever might have been the fate of the plea of *former recovery*, it was absolutely necessary for the plaintiff to sustain this issue, in order to entitle himself to recover. Rev. St. c. 41, § 15. But, on that *same issue*, in the *former* suit, a verdict and judgment had been rendered; and that judgment must be conclusive of the right of action in this case. *Barney v. Goff et al.*, 1 D. Ch. 304.

The opinion of the court was delivered by

REDFIELD, J. This case seems to have been tried by a jury, in the court below, without objection. This was, indeed, unnecessary, and irregular in some respects. The issue formed upon the plea of *nul tiel record* could only be tried by the court, and should have been *first* tried, before it could be known that any issue for the jury would remain in the case. For, if determined in favor of the defendant, as it in fact was, nothing would remain for the jury to try. We should not deem it necessary here to notice the subject, if the trial, having passed under the revision of this court *sub silentio*, was not liable to be thus drawn in precedent, in future trials.

The same reason, last stated, makes it necessary to advert, perhaps, to the form of the defendant's first plea in bar. It alleges, that the same matter had been determined in a former trial between the same parties, without stating in favor of which party the case was determined, and then concludes with a *prout patet per recordum*. This plea is traversed, and is treated by both parties as a plea of *estoppel*. The books all agree, that the greatest strictness is required in pleading estoppels. Every fact necessary to create the estoppel must be alleged with the strictest certainty; and it must be alleged that all these facts appear by the record, which is vouched

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as an estoppel; and the court then determine the matter, on inspection of the plea, if demurred to, or of the record, if that be denied. Co. Litt. 352 *b.*, Thomas's Arrangement, 3d vol. 431-433; 1 Chit. Pl. 238-9. All pleas of estoppel must rely upon the estoppel in conclusion. Co. Litt. 303 *b.*, Thomas's Arrangement, 3d vol. 431; 1 Chit. Pl. 540. The case of *Shelley v. Wright*, Willes' R. 9, contains an approved precedent of a plea of estoppel. But the plea in this case not being demurred to, it remains to determine its merits.

It is not easy, without considerable labor, to extract, from the numerous cases upon the subject, the precise doctrines which have been settled upon the subject of the effect of a former verdict, or judgment, between the same parties, touching all or any portion of the matters again at issue. Perhaps the following corollaries are fairly deducible from all the cases, which will be found to embrace most of the principles involved in the subject.

1. There is always to be observed this distinction, between a former adjudication, when it is relied upon as having determined the entire merits of the controversy now in hand, and when it is brought forward only as settling some collateral fact involved, and which might have been merely incidental to the former controversy, that in the former case the defence is never required to be pleaded strictly as an estoppel, while it always is in the latter case. *Stafford v. Clark*, 2 Bingham 377, [9 Eng. Com. Law R. 437;] 3 Stark. Ev., 3d Lond. ed., 960, 961. The former defence is not by way of estoppel, but only an equitable defence, like payment, release, or accord and satisfaction, an award, or account stated, all which matters, as well as a former recovery, may be given in evidence under the general issue in debt, or assumpsit, trover, or trespass on the case; and in trespass, or covenant, need only be pleaded like any other plea in bar, and not as an estoppel. It is not essential to the defence of a former recovery, that the plaintiff should have prevailed in the former suit, but only that the trial should have been upon the merits.

2. Where the former trial is relied upon, as settling some collateral fact involved in the present trial, it must appear by the record of the former judgment, that that fact was put distinctly in issue by the parties in that case, and that it was determined by the triers. *Voight v. Winch*, 2 B. & A. 668; *Fairman v. Bacon*, 8 Conn. R.

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418. This last requisite of an estoppel by matter of record, that it should appear, *by the record vouched*, that the particular fact was in issue and found, is determined by the cases of *Outram v. Morewood*, 3 East 845, *Hopkins v. Lee*, 6 Wheaton R. 109, and *Jackson v. Wood*, 3 Wendell, 27.

3. But if such fact do not appear by the record to have been distinctly in issue and determined, or if the matter be not properly pleaded as an estoppel, it is said the record and finding in the former trial are evidence, but not conclusive. *Wright v. Butler*, 6 Wend. 284; *Standish v. Parker*, 2 Pick. 20; *Parker v. Standish*, 3 Pick. 288; *Spooner v. Davis*, 7 Pick. 147; *Vooght v. Winch*, *ubi sup.*; *Outram v. Morewood*, and many others. Upon this last subject there is, no doubt, as is said by Mr. Starkie, no inconsiderable difficulty. 3 Stark. Ev. 958. I profess myself utterly at a loss to find, from all the cases upon the subject, what rule can be laid down for determining the effect of a former verdict upon the same facts, if it is to have any effect in a future litigation, and is not conclusive. Some learned judges have said, "it is evidence," "stringent evidence," "pregnant evidence," and there the matter rests. My own opinion is, that the former finding, even when it is necessary to resort to *oral* evidence to ascertain that the fact in dispute was involved in the former controversy, is still conclusive upon the parties, and of course upon the jury. But it cannot be pleaded as an estoppel, and must of course go to the jury; and, as it rests *in pais*, for the jury to find whether the disputed fact was determined by the former trial, the jury, by refusing to find *that fact*, which rests in their discretion, always have it in *their power* to disregard the former verdict; in that sense, therefore, it is not conclusive, as it is when the matter appears upon the record, and may be determined by the court.

4. It is said, in all the books, that estoppels must be pleaded, and that if not, they are waived, but that, if the party has no opportunity to plead the matter, he may give it in evidence, and it will be equally conclusive. This, I have no doubt, is correct, on the same ground that certain other defences in certain actions are required to be specially pleaded, as for example the statute of limitations. But I profess myself utterly opposed to the reason, which has been handed down to us for requiring this strictness of pleading in

Jabez Sargeant, *ex parte*.

regard to estoppels of record, that is, that "estoppels are odious," "not to be favored," "because they shut out the truth." This last clause seems to contain the pith of the whole matter, the hinge upon which all the odium turns,— "because they shut out the truth!" If it were said that they shut out *litigation*, or *controversy about truth*, I could comprehend the force of the maxim; but by what species of logic it is made to appear that a second contestation of the same matter, after the lapse of considerable time, and the uncertainty which time always brings, more or less, upon all past transactions, is to be made more sure of resulting in the truth, is quite beyond my comprehension. I hold, that the entire doctrine of the conclusiveness of former adjudications, not only as to the merits of the controversy, but as to all facts distinctly put in issue, and found by a tribunal of competent authority, instead of being an odious doctrine, is one of the most salutary and conservative doctrines of the law. Well has the maxim been appropriated to this subject,—*Interest reipublice sit finis litium*.

From what has been said, it will be apparent that in the present case the estoppel was conclusive. It seems to possess all the necessary requisites. 1. It is the same subject-matter. 2. It is between the same parties. 3. The fact relied upon was put distinctly in issue in the former case and found by the triers. 4. *This appears by the record*. 5. No exception is taken to the form of pleading the estoppel.

Judgment affirmed.



JABEZ SARGEANT, *ex parte*.

An execution debtor is estopped from denying, on *habeas corpus*, the existence, or corporate capacity, of the plaintiff, in whose name the judgment against him was recovered.

When a corporation is plaintiff in a suit, the chief officer of the corporation may make the affidavit, required, under section 63 of chapter 28 of the Revised Statutes, to entitle the plaintiff to take out an execution against the body of the defendant.

Jabez Sargeant, *ex parte*.

Where a person, professing to be the president of a corporation, has made an affidavit under that section of the statute, which affidavit has been received by the clerk, who has thereupon issued execution against the body of the defendant, the supreme court, upon *habeas corpus* brought by the defendant, will, in the absence of all testimony, presume such person to have been president of the corporation.

HABEAS CORPUS. The petitioner prayed to be relieved from imprisonment, in the common jail of Windsor county, upon an execution in favor of the President, Directors and Company of the Bank of Windsor, against the petitioner and others. The execution creditors appeared to answer to the petition, without citation. It appeared, upon the hearing, that the execution, upon which the petitioner was committed, was issued upon a judgment rendered by the Windsor county court, at their May Term, 1843, upon a contract entered into by the defendants, subsequent to the first day of January, 1839; that an execution was issued against the property of the defendants, and returned unsatisfied; that, on the tenth day of September, 1844, one George B. Green filed his affidavit with the clerk of said court, setting forth that he was President of the Bank of Windsor, and that he had good reason to believe, and did believe, that the said Jabez Sargeant was about to abscond from this State, and had money, or other property, secreted about his person, or elsewhere; that the said clerk thereupon issued an *alias* execution, upon said judgment, against the body of the petitioner, and against the goods, &c., of the other execution debtors; and that the petitioner was committed to jail, and was now imprisoned, by virtue of said *alias* execution.

Evidence was introduced by the petitioner, tending to prove, that, prior to the rendition of the judgment upon which the said *alias* execution was issued, the whole capital stock of the Bank of Windsor was sold upon execution against the bank, at sheriff's sale, and was bid off by one Ara Cummings, and that the same was subsequently, and before the rendition of said judgment, sold by said Cummings to this petitioner.

O. P. Chandler for petitioner.

1. The Revised Statutes (p. 187 § 69) provide that executions shall not issue against the body, unless the plaintiff leaves with the

Jabez Sargeant, *ex parte*.

authority his affidavit. This cannot be construed to mean that the oath may be made by an agent, or attorney. 1. The language is definite and explicit, and admits of no such inference whatever. 2. While the Statute of 1841, [Acts of 1841, p. 4,] expressly provided for such oath by an agent, or attorney, the present statute omits those words;—which shows that it was considered expedient to require the oath of the *party* when, by the act of 1842, the act of 1841 was repealed.

Whenever, by statute, a provision is made, which requires that an act of a corporation should be verified by oath, the statute makes provision for it. Rev. Stat. 190, § 6. Bankrupt Law,—Owen on Bankruptcy.

If, then, the corporation, as such, is required to make the oath, we say it has not been done. It is an ideal person, without body, or soul, and cannot take an oath. It only speaks through its record; therefore, if the members of the corporation should *all* take the oath jointly, it would not be the oath of the corporation; much less could they swear by their President; nor is the President, by any vote, or by-law, authorized to make it. 2 Kent 279. *Bradley v. Richmond & Tr.*, 6 Vt. 122.

Green cannot do this act as *one* of the plaintiffs. There is but one plaintiff, and that is the corporation, by whatever name it may be called. The members are not recognized as partners; they cannot sue in their joint individual names, nor can they be sued, nor discharge a suit, plead, nor be impleaded.

2. The shares having been all sold at sheriff's sale, and the corporation put in such condition that it could no longer act as such, it was thereby dissolved;—therefore the act of Green was void;—and, by law, if dissolved, it cannot collect its debts; *Briggs v. Penniman*, 8 Cow. 391; *Slee v. Bloom*, 19 Johns. 456; 2 Kent 311; Angell on Corp. 531. Sargeant, being the owner of all the shares, could not legally be committed,—at least should not now be held in confinement.

C. Coolidge for creditors.

1. The petitionee insists that any officer, or stockholder, of the corporation may make the oath described in the petition;

2. That he who is, *de facto*, an officer of the corporation, and

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acting as such, is to be so recognized; and his acts are good, until, on *quo warranto*, his authority is adjudged void.

The opinion of the court was delivered by

WILLIAMS, CH. J. On the petition of Mr. Sargeant a writ of *habeas corpus* has issued to the sheriff of Windsor County, who, in obedience thereto, has him now before the court; and, on his return, it appears that in May, 1843, the President, Directors and Company of the Bank of Windsor recovered judgment against Mr. Sargeant and others; that George B. Green, as President of the Bank, made an affidavit, to entitle the bank to a writ of execution against the body of Mr. Sargeant, on which a writ of execution issued, and he was committed to the jail in the county of Windsor, where he now remains. To relieve him from this imprisonment is the object of this writ of *habeas corpus*.

His discharge is urged on two grounds;—First, That he, Mr. Sargeant, owned all the stock in the bank, and that, in consequence of the bank being sold to him in the year 1838, the corporation was dissolved;—and, Second, That, under the provision of section 63, chapter 28, of the Revised Statutes, a bank, or any other corporation, cannot have an execution against the body of its debtors, and cannot make the affidavit therein required.

To the first ground it is a satisfactory reply, that, since the sale to Mr. Sargeant in 1838, the bank has been in existence under their charter, and, in their corporate name and capacity, recovered the judgment against him, on which the execution issued of which he complains, and that, by that judgment, he is estopped from denying, in this way, the legal existence of the plaintiffs in that judgment.

On the second ground, it is to be remarked that the statute, which abolishes imprisonment for debt, has provided, that, if the plaintiff shall file with the authority issuing a writ an affidavit, stating that he has good reason to believe, and does believe, that the defendant is about to abscond from the state, and has secreted about his person, or elsewhere, money, &c., such writ may issue against the body, &c. The term plaintiff applies to all suitors in court, whether natural, or artificial, and the instances are not unfrequent, where persons are mentioned as individuals, in a statute,

Jabez Sargeant, *ex parte*.

when corporations must be included. In the statute relating to the levy of executions it is enacted that all houses, &c., belonging to any person in his own right, or for his own life, shall stand charged with his debts, and the other provisions speak of the debtor as an individual, and yet it cannot be contended that the statute does not apply to any corporate bodies, who can contract debts.

It is our duty so to construe the act in question, as to give to all creditors this remedy against their fraudulent and unwilling debtors, unless the intention to exclude them from its benefits is apparent and manifest. It cannot be supposed, that the legislature intended to exclude from the benefit of this act the numerous class of suitors, who are public or private corporations. The term plaintiff will certainly include them, as well as an individual. It is, however, urged, that, because a bank, or a company incorporate, cannot make an oath, they cannot file the affidavit required by the statute. We, however, think, that, within the meaning of the act, if the plaintiff cannot take an oath, as if the plaintiff were an idiot, or a body corporate, for the affidavit of the plaintiff may be substituted the affidavit of those who appear for him, and manage his concerns, and that the affidavit of the guardian, or, as in the present case, of the President of the bank, who is at the head of the corporation, may be received.

The statute in question only requires the plaintiff to *file an affidavit*, and, were it not for the subsequent words, it might not be necessary to file his own affidavit; but when it is added—"stating that *he* believes"—it may, with propriety, be considered, that the plaintiff must, in all cases, make the affidavit, when he can take and assume the obligation of an oath. But, when there is no such person, who can take an oath, the statute will engraft an exception on itself in favor of the agent, or head, of a corporation.

In England there must be an affidavit to hold to bail, and at one time the affidavit must negative any tender in notes of the Bank of England. This affidavit must be express, certain, explicit and positive as to the existence of the debt; and yet, in the case of an administrator, or assignee, or a corporate officer, for a debt due to the corporation, (*Mayor of London v. Dias*, 1 East 237,) he may swear to the best of his knowledge and belief; and, in the last case, Lord Kenyon held, that the affidavit might be made by the clerk,

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or some of the officers, of the corporation. The case of a corporation was considered as an exception to the general rule in the case of *Elliott v. Duggan*, 2 East 24. In the case of a plea in abatement, the party offering the plea must, by affidavit, show the truth thereof;—this affidavit, it was held, might be made by attorney; *Lumley v. Foster*, Barnes 344.

We have, therefore, no hesitation in saying, that, when a corporation is party, the head of the corporation may make the affidavit, required to entitle the plaintiff to an execution against the body;—whether the clerk, or cashier, could make the affidavit, is not before us.

As to the argument, that there is no evidence that Mr. Green was President, we have only to say, there is no evidence that he was not. The clerk, who issued the execution, must have been satisfied as to his authority; and it is, at least *prima facie*, to be taken that he was such officer, and so made it appear to the clerk issuing the execution.

The result is, that Mr Sargeant must be remanded.



ELIPHALET KIMBALL v. CHARLES IVES, Administrator of SOPHONIA DIX.

The statute of limitations is not applicable to the account of a guardian against his ward, while the relation subsists; and, after its termination, lapse of time will not bar the guardian's claim, when the delay is sufficiently explained by the circumstances of the case.

The question, whether a claim shall be considered as barred by mere lapse of time, is one of fact, which must be determined by the jury, and, if not litigated before the jury, cannot be raised, as a question of law, before the court.

Where a guardian presented an account against the estate of his ward, more than twenty years after the ward became of age, and it appeared that all the property of the ward had, from the time of the appointment of the guardian, continued in the possession of the guardian, and that the ward was *non compos*, and had always, after she became of age, and until the time

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of her decease, resided in the family of the guardian, who had married the ward's mother, and that no steps were taken to examine into the situation of the estate of the ward until after the decease of her mother, which was seven years after the decease of the ward, and then an administrator was appointed upon the estate of the ward by the probate court, and the guardian then presented his claim, it was held that the lapse of time was fully explained by the circumstances in the case, and that no presumption of payment, or settlement, of the claim could arise.

APPEAL from a decree of the probate court, disallowing the account of the plaintiff as guardian of the intestate. A commissioner was appointed by the county court, who reported the following facts.

In 1804, Samuel Dix, the father of the intestate, Sophronia Dix, died, leaving his widow, Chloe Dix, who was, on the 20th day of June, 1804, appointed guardian of the said Sophronia by the probate court, and continued such guardian until her intermarriage with the plaintiff, in 1807. The plaintiff, upon his marriage with the said Chloe, went into possession of the estate which had been set to the said Sophronia as her portion of her father's estate, and took the rents and profits thereof until October, 1839. On the 24th day of June, 1808, the plaintiff was, by the probate court, appointed guardian of the said Sophronia, who was then about nine years of age, and continued her guardian until she became of age, in 1817; but she continued to reside in his family until her decease, in 1832. The said Sophronia was *non compos mentis*, and was possessed of no property, besides the estate set to her from her father's estate, except some few sheep, which were given to her, and which, in the year 1825, the plaintiff received, giving his note to her therefor,—which note was credited to her, in his account. No measures were taken, or effort made, to look up, or settle, the estate of the said Sophronia, until after the decease of her mother, the said Chloe, who died in 1839, when the said Ives was appointed administrator upon her estate, and made, and returned into the proper office, an inventory thereof. The plaintiff presented his account, as guardian, to the probate court, for allowance, in January, 1840.

The county court rendered judgment, upon this report, in favor of the plaintiff for the amount of his account; to which decision the defendant excepted.

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S. Fullam for defendant.

1. The defendant insists that the plaintiff is not authorized, as guardian, to involve his ward in debt. He cannot pledge the ward's credit to another,—much less to himself.

2. If any such claim existed, it was barred by the statute of limitations.

C. Coolidge for plaintiff.

1. There is no statute of limitations applicable to this case. *Evarts v. Nason's Estate*, 11 Vt. 122.

2. But the defendant insists that payment is to be presumed. To repel any such presumption, it is only necessary to resort to these facts. 1. No pretence of payment, in fact, is set up by the defendant. 2. The ward was *non compos mentis* from her birth to her death. 3. She lived with the plaintiff and her mother (plaintiff's wife) until her death, (in 1832,) her mother surviving her. 4. With the exception of the small sum due from the plaintiff to his ward for sheep, she died seized of all and the same estate which she derived from her father. Besides this, she had nothing to pay plaintiff with, had she been of competent understanding to transact business.

The opinion of the court was delivered by

REDFIELD, J. Two questions are made in the present case:

1. Whether the plaintiff's account is barred by the statute of limitations. 2. Whether a settlement of the account is to be presumed from lapse of time. It has been long settled, that the statute of limitations will not, in equity, bar an account subsisting between trustee and *cestui que trust*, so long as the trust subsists, and the relation is acknowledged on both sides,—which ought, perhaps, to be extended to the case of a guardian's account, as well after, as before, the guardianship ceases, until the account is settled and the property surrendered, or some adverse claim, inconsistent with the former relation, is set up. *Decouche v. Savetier*, 3 Johns. Ch. R. 190; *Goodrick v. Pendleton*, Ib. 384; *Coster v. Murray*, 5 Ib. 522. It is true, indeed, that, where the law fixes a limitation to any concurrent remedy, this will be applied in equity; so where the trust is denied, and the possession becomes adverse.

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Kane v. Bloodgood, 7 Johns. Ch. R. 90, 127; *Roosevelt v. Mark*, 6 Ib. 266; *Murray v. Custer*, 20 Johns. 576.

In analogy to this principle of chancery law, it has always been held, in this state, that the statute of limitations will not bar the account of an executor, or administrator, or of a guardian, by parity of reasoning. *Evarts v. Nason's estate*, 11 Vt. 122; *Riz, Adm'r, v. Heirs of Smith*, 8 Ib. 365. In the former of these cases it was held, that mere lapse of time will not bar such a claim. The same reason, indeed, which should exempt such a claim from the operation of the statute of limitations, should equally exempt it from the presumptive bar, from lapse of time.

There is another reason, why this presumptive bar cannot be applied in the present case,—no such question was raised until the hearing in this court. This presumptive bar is always a matter of fact, to be determined by the triers of the fact, and should have been raised and determined by the commissioner. But from the commissioners, reporting the account, and referring the questions of law, arising upon the facts, to the court, we are to infer that the account is to be allowed, unless the facts reported by the commissioner constitute a peremptory bar. There are some very respectable authorities, which so treat the defence of mere lapse of time. *Sumner v. Child*, 2 Conn. 607; *Cope v. Humphreys*, 14 Serg. & R. 15; *Holcroft v. Heel*, 1 B. & P. 400. Some other cases seem to favor the same views; but that has arisen, perhaps, mainly, from the fact, that, in the absence of all proof to the contrary, a lapse of twenty years is considered sufficient time, from which to presume a grant, or payment, or most other matters resting in presumption. And the jury, when recommended by the court so to do, will ordinarily make such presumptions, without hesitation. And there are, no doubt, many cases, where these presumptions have been made, quite contrary to what was supposed to be the fact. But that has happened, ordinarily, in regard to deeds and conveyances, in order to quiet a long and uninterrupted possession,—which in this state requires only fifteen years.

But the payment of a debt, or the settlement of an account, is never to be presumed, except in accordance with the rational probabilities of the case. It is, therefore, but just and reasonable it should be judged of by the triers of the fact. Such, too, will be

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found to be the settled rule of the English law. 2 Wms. Saund. R. 175, n. 2. *Mayor of Hull v. Horner*, Cowp. 102. In this last case Lord Mansfield says, "I think it was properly left to the jury, whether they would presume such a grant." In *Campbell v. Wilson*, 3 East 294, Lord Ellenborough says; "It might be too much to say, in the case of *Holcroft v. Heel*, that the adverse user of the neighboring market for twenty years was a bar to the action by the grantee of the crown. In strictness it was not. But certainly the evidence in this case was sufficient to warrant the jury in presuming a grant of the right of way." The rule is laid down in the late edition of Starkie's Evidence, vol. 2, 824, thus; "But a lapse of twenty years, before the statute, was no legal bar, but merely afforded a presumption in fact for the jury." And this last proposition contains the result of all the English cases. The consideration, too, that a less time than twenty years, when circumstances concur to support the presumption, is permitted to go to the jury, from which to find the fact sought, and that even a much longer time than twenty years is permitted to be explained by evidence, shows very clearly that the presumption is one of fact, and not of law; *Gray v. Bond*, 2 B. & B. 667; Lord Ellenborough, in *Bealey v. Shaw*, 6 East 214. From this last case, as well as the nature of the subject, I should consider presumptions of payment and of settlement more undeniably matters of fact for the jury, than presumptive grants, which, in the absence of all evidence to the contrary, become absolute in the term of fifteen years in this state. In the present case, the lapse of time was fully explained by the facts and circumstances in the case, and no presumption of payment or settlement of the account could arise.

Judgment affirmed, and ordered to be certified to the probate court.

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JOHN PETTES and EPHRAIM INGRAHAM, JR., v. BANK OF WHITEHALL.

[IN CHANCERY.]

The court of chancery have no power to enjoin a judgment of the supreme court, where the ground for relief, set up in the orator's bill, is, that the supreme court, through haste, or inadvertence, rendered an erroneous decision.

When judgment, in the county court, is rendered in favor of the defendant, upon demurrer, without his having exercised, or waived, his right of review, in a case, in which if judgment were rendered against him, there could be no controversy as to the amount of damages, and the plaintiff excepts, and the judgment is reversed by the supreme court, the supreme court will proceed to assess the damages, and will not allow the defendant to review. *Samb.*

When a party has committed a *tortious* act, in consequence of a mistake of law, and the other party was not in fault, a court of equity will not relieve him from the consequences of his acts.

In this case, a sheriff, who held an execution, discovered a defect in it, which he supposed rendered it void, and he therefore neglected to execute it; and it was held that a court of equity could not relieve him from the consequences of his neglect of duty,—judgment having been rendered against him therefor in a court of law.

APPEAL from the court of chancery. The orators alleged, in their bill, that, from the first day of July, 1839, to the first day of December, of the same year, the orator Pettes was sheriff of the county of Windsor, and that the orator Ingraham was a deputy sheriff under him; that on the eighth day of July, 1839, Ingraham, who resided at Chester, received, in a letter from Daniel Roberts, Jr., of Manchester, an attorney at law, an execution in favor of the Bank of Whitehall against Edward Manning, Stephen Cummings and Addison Streeter of Ludlow, and Silas Briggs of said Manchester, for \$555 damages, and costs, purporting to be issued upon a judgment rendered by Bennington county court, at their June Term, 1839, directed to the sheriff of the county of Windsor, or his deputy, to serve and return, made returnable within sixty days from date, and bearing date the thirteenth day of June, eighteen hundred

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and nine ; that the letter inclosing the execution contained this suggestion,—“I am not acquainted with the circumstances of the ‘debtors, but suppose them to be rather desperate ; of course, any ‘reasonable security would be preferred by the creditors to a commitment ;” that Ingraham, not discovering but what the execution bore date in 1839, and supposing it to purport upon its face to be in full life, ascertained that the debtors were destitute of property, and that one of them had gone to the westward, and that the others had taken the poor debtor’s oath on other matters, and that he so informed said Roberts, by letter, requesting directions how to proceed, as early as the 20th of July ; that he waited until the 10th day of August, 1839, which would have been the last day but one of the life of the execution, if it had borne date in 1839, when, not having received any answer from Roberts, he arrested the debtors who were within his precinct, and took them to Woodstock, in order to commit them to jail ; that, in making a copy of said execution for the jailer, it was discovered that the execution was dated in 1809 ; that Ingraham thereupon took advice from those upon whom he could depend, and was advised that he would be a trespasser, if he committed the debtors to jail upon that execution ; and that this was the first knowledge that Ingraham had, that said execution was not dated in 1839.

The orators farther alleged, that Ingraham thereupon discharged the debtors, and returned to Chester, and, on the 12th day of August, 1839, wrote a letter to Roberts, inclosing to him the execution, and informing him of the facts ; that, if a correct execution had been returned to Ingraham within any reasonable time thereafter, the same debtors might have been again arrested, and the creditors have had the benefit of any security which they might have had, if they had been committed upon the first execution ; that the Bank of Whitehall commenced an action, which was entered at the November Term, 1839, of Windsor county court, against the orator Pettes, for the neglect of Ingraham to commit said debtors upon said execution ; that, at the May Term, 1840, of said court, judgment was rendered in favor of the defendant in that suit, upon demurrer to the plaintiff’s declaration ; that the plaintiffs took exceptions, and the Supreme Court, at the February Term, 1841, reversed the judgment of the county court, and rendered judg-

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ment in favor of the plaintiffs in that suit, for the whole amount of said execution, and interest;* that the counsel for Pettes, knowing that he had never reviewed the action, nor waived his right of review, applied to the court, as soon as the judgment was entered, for leave to enter a review, and have an issue formed to the jury, and have the same sent to the county court for trial, and were about to read the statute to the court, showing Pettes' right to a review of said action; but that the court were in such haste to be on their way to the next county, to hold their session there, that they refused to hear the statute read, and forthwith decided that the action was not open to a review.

The orators farther alleged, that all of the said execution debtors were, at the time the execution was in the hands of Ingraham, wholly destitute of property, and had sworn out of jail, and that it would have been of no use to the creditors to have had them committed to jail.

And the orators prayed, that the defendants, might be perpetually enjoined from prosecuting or collecting the said judgment recovered against Pettes.

The defendants, in their answer, averred that they had never given any directions relative to the said execution, or the demand upon which it was predicated, except to have it proceeded with according to law; and that the mistake in the date of the execution was caused entirely by the error of the clerk who issued it, and was wholly unknown to them, or to their attorney, at the time when the execution was sent to Ingraham. The defendants admitted the allegations of the bill as to the letters written, the commencement of their action against Pettes, and the recovery of the judgment by them therein, and that Cummings had sworn out of jail, as alleged in the bill, and that Streeter was poor; but they denied that he had sworn out of jail, or that either of the debtors was wholly destitute of property; and they averred, that, by the neglect of Ingraham, they had lost the right to charge the bail of Manning, who was at the time out of the State. They also admitted, that, if they had immediately sued out an *alias* execution, they might have arrested and committed Cummings and Streeter thereon, but denied that they

*Reported in 13 Vt. Rep. 395; *Bank of Whitehall v. Pettes*.

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were bound to do so ; and they admitted the application to the Supreme Court for a review of their action against Pettes, as alleged, but denied that Pettes' counsel were about to read any statute "showing" his right to review, or that the court were in such haste to attend to other business, as not rightly to attend to the business then on hand, or that they erred in the decision which they gave.

The answer was traversed, and testimony taken on the part of the orators. From the testimony of Hon. Titus Hutchinson it appeared that Ingraham came to him, on the 10th day of Aug., 1839, and procured him to make a copy of the said execution, to be delivered to the jailer, upon the commitment of the debtors, whom Ingraham then had with him at Woodstock, and that, in making the copy, the error in the date of the execution was discovered by the witness, and that Ingraham asked his advice how to proceed, and that he told Ingraham that it was his decided opinion that the execution was dead, and that he would be liable to an action for false imprisonment, if he should commit the debtors thereon, and that nothing could be done upon that execution, which would be of any advantage to the creditors, and that he, Ingraham, thereupon concluded to discharge the debtors, and return the execution to the attorney from whom he received it. Testimony was also taken by the orators, tending to show that all of the debtors in the said execution were wholly destitute of any property, and that Cummings and Manning had, previous to the issuing of that execution, taken the poor debtor's oath.

The court of chancery dismissed the orators' bill, with costs ; from which decree the orators appealed.

T. Hutchinson for orators.

We contend that the attempt to collect this debt of the sheriff was an attempt at extortion, and that relief ought to be had in equity.

1. The debt was wholly valueless, by reason of the poverty of the debtors.

2. If the debt was of any value, it was as good, when the attorney of the bank received the execution, and was informed of its incorrectness, as when Ingraham received the execution. Even if

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the creditors had a fair claim against the sheriff, they ought to have used all the means in their power to collect it of the real debtors.

3. The bank could have no claim at law, against the sheriff, for not serving this execution, unless upon the ground that the sheriff, in a case new to him, must bear the responsibility that three events should concur,—1, That the court should decide that they had power so to amend this execution, after a commitment upon it, as to give it retrospective life, and thus shield the sheriff for treating it as alive,—2, That the creditors should make application to the court for such amendment,—for the sheriff was no party to the record, and could make no motion concerning it,—and 3, That the court, in the exercise of their sound discretion, should in fact, on such application, allow such amendment. A curious responsibility, this, for a creditor to cast upon a sheriff.

4. If a court of law, deciding upon demurrer to the declaration of the bank against the sheriff, not bringing to view the various circumstances which create an equity in favor of the sheriff, can decide against him, we have a right to expect that this court, as a court of equity, will decide upon the equity now brought to view, and decree a perpetual injunction upon the judgment.

5. The orators have the strongest possible equity to be relieved from all the embarrassment the bank have subjected them to, by sending such a defective execution, and giving no notice of its defects. *King v. Baldwin*, 17 Johns. 384.

6. But it seems that the sheriff, after all his caution, made a mistake. He intended to obtain good advice, but in this he mistook. Let it be so. Is it not an important branch of chancery jurisdiction to relieve from burdens induced by mistake?

7. On page 160 of the Revised Statutes a review is given in all cases, with exceptions. This case is not among the exceptions; nor is it a case where a review is taken away on page 165. But the review is to be had before the county court, and the plaintiffs carried this case to the supreme court, before which no review can be had, though the orators had never waived their right of review. Therefore, either the orators were entitled to their review, or there is an unintentional slip in the statute; and in *either case* they should be relieved in equity.

8. If the orators have any equity in their case, the decision of

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the court, rendering judgment on the demurrer to the declaration, does not withstand that equity. In *Blackhall v. Combs*, 2 P. Wms. 70, the defendant was sued for a debt, which accrued before his act of bankruptcy, and he was not able to procure his certificate, or a copy of it, to show his defence, and there was judgment against him; and, on a bill for relief against that judgment, the chancellor decreed a perpetual injunction of the judgment. In *Gainsborough v. Gifford*, 2 P. Wms. 424, relief was granted after a verdict and judgment. In *Bell et al. v. Cunningham et al.*, 1 Sumner 89, 108, the circuit court granted a perpetual injunction upon its own former judgment, which had been affirmed by the supreme court of the United States, though there was no fraud, and neither party was to blame; and this because the judgment was unjust, as was made to appear by facts not proved on the trial at law. In *McDonald v. Nelson*, 2 Cow. 193, it is said "There is no doubt that the court of chancery has power to grant relief against deeds and judgments, not only when obtained by fraud, but also when regularly obtained, if there are circumstances of extraordinary hardship, or great inadequacy of consideration." And see *Ex'rs of Boyce v. Grundy*, 2 Pet. 210; *King v. Baldwin*, 17 Johns. 384; *Hepburn v. Dunlap*, 3 Pet. Cond. R. 540; *Bank v. Lewis et al.*, 8 Pick. 117; *Champlin v. Laytin*, 1 Edw. Ch. R. 467, 472, 473; 6 Paige 202; *Bingham v. Bingham*, 1 Ves. 127; *Willan v. Willan*, 16 Ves. 72; *Pusey v. Desbouvrie*, 3 P. Wms. 320; *Lansdown v. Lansdown*, Mosel. 364; *Naylor v. Winck*, 1 Cond. Ch. R. 561; 1 Story's Eq. 106, 120, 133, 134, 139, 149; *Lammot v. Bowley*, 1 Har. & J. 500, 525, 526; 2 Kent 491, (n.) S. C.; *Lawrence v. Bانبier*, 2 Bayl. S. C. Rep. 626; *McCartly v. Decaiz*, 1 Story's Eq. in note; *Lynde v. Wright*, 1 Aik. 383; 4 Johns. Ch. R. 619; 5 Ib. 494; Fonbl. Eq. 694, in note.

E. Hutchinson for defendant.

We have been unable to view the orator's claim in this case as any thing else, than, in substance, asking this court, sitting *quoad* a court of chancery, to *over-rule* the decision, which, upon mature deliberation, they have made in the same case at law. The case does not fall within the principles of any decided case, where a party has been restrained in equity from enforcing a judgment obtained

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at law. No fraud is imputed to the defendants, nor any misrepresentation, or concealment of facts, nor any deception, practiced in any form, either upon the court, or the party, in the obtaining of that judgment. There is no pretence that the judgment is not in full force, or that it has been in any part satisfied; nor that either the obtaining, or enforcing, of it, is to be regarded as a violation of any contract, or understanding, with the defendants, either express or implied; nor that the deputy's neglect, which was the foundation of that recovery, was at all induced by any act of the defendants, or their agent. For the bill expressly alleges that the execution would have been executed and returned within its life, had it not been for the discovery of the error in the date. But now the officer says, although it was in fact a good process, and I was in law bound to have executed it, (as established by that decision,) still, I at the time was told, and honestly believed, that the law was otherwise; and, inasmuch as the defendants in that process were all insolvent, and a levy would have done the creditors no good, a court of equity, ought to interpose, and prevent that judgment from being enforced against me. Now we ask, what reason is thus far assigned for the interference of a court of equity, which is not presumed to have existed in ninety nine out of every hundred cases, where a recovery has ever been had in this state against an officer for a neglect to return an execution?

The officer's duty was, to have executed the process according to its commands. He says, that he omitted to do it, because he at the time was advised and believed that the law would not justify him in executing it. This court have decided (13 Vt. 395,) that that was a mistake. It was, then, (viewed in the light most favorable to the orators,) a *mistake of the law*, which occasioned the omission of duty, for which that recovery was had. But "mistake of the law" is no excuse for an omission of duty;—*Ignorantia legis neminem excusat*;—and this maxim is equally as much respected in equity as in law." See Title "Mistake," 1 Story's Eq. Jur. 121, § 111; Ib. p. 124, § 112; Ib. p. 129, § 116; Ib. p. 153, § 137; Ib. p. 154, n. 1; Ib. p. 155, cases cited in n. 1; Ib. p. 156-7, § 138; Ib. p. 142, n. 1.

The insolvency of the debtors (if it were to be regarded as important for any purpose,) could only affect the damages. But the

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question of damages is exclusively within the province of the court rendering the judgment. That question was raised in the suit at law, and the rule of damages was decided by that court to be the amount of the execution and interest;—and, in so doing, the court only *declared* the law, (although held differently in some of the sister States,) as it had been uniformly held by the courts of this state. *Hall et al. v. Brooks*, 8 Vt. 485. But it is said, that the fact of the insolvency of the debtors was not in proof before that court. True, but their judgment must necessarily have been based upon its assumed existence. Indeed, it is not pretended but that, had that fact been legally before the court, the decision *at law* must have been the same. But, though the established rule of damages, and long settled in all similar cases, and although decided to be the rule in this particular case *at law*, still it is contended, that that rule can be altered, in the same case, in chancery. That cannot be done. "The decision of a court of competent authority is conclusive upon *all courts* of concurrent jurisdiction. *Hall et al v. Dana*, 2 Aik. 381. *Emerson v. Udall*, 13 Vt. 477.

Again, what would be the effect of sustaining the orators' bill? If proof of ordinary diligence and good faith in the officer, coupled with the insolvency of the debtors, is to entitle the officer to relief in equity, upon the ground of one kind of accident, or mistake, he would be equally entitled to relief, whenever proof could be made of the same facts, and the accident, or mistake, arose from any other cause. No apparent hardship in any particular case can justify the confounding of all the distinctions of jurisdiction between different tribunals.

The bill sets forth the correspondence between the officer and the orators' attorney. We have already suggested, that the statements of the bill show, that the officer was in no measure induced to suffer the execution to expire in his hands by reason of any thing contained in those letters,—but it was occasioned solely and entirely by the supposed irregularity of the execution. But, even if it had been so, the letters were in the officer's possession and would have made a perfect defence at law. *Strong et al v. Bradley*, 14 Vt. 55. And the orators, having had the opportunity, if they wished, and having presented no plea raising any such question, (if there were any foundation for it in fact,) should be regarded as having understandingly

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waived it, unless they could, after judgment against them at law, persuade the court, in its discretion, and as a mere matter of favor, to permit them to withdraw their demurrer and plead *de novo*; which was not a matter of right, nor to be expected as a matter of discretion, and the refusal to grant which was neither *error*, nor a legitimate ground of application to chancery. *Emerson v. Udall*, 13 Vt. 477.

The allegations, that the orators were unjustly deprived of their right of review, that the Supreme Court "decided that said action 'was not open to review and refused a review' in the same,"—also that the court would not listen to their application to send the case back to the county court for the purpose of having an *issue to the jury formed* and tried, but proceeded to render final judgment,—are open to the same objection. The bill states that they were points submitted and decided. They are, therefore, *res adjudicatæ*; and, whether the decision was right or wrong, it is conclusive upon the court of chancery as well as all other courts. But who can doubt the propriety of that decision?—Surely no review could have been granted in the Supreme Court. And, by force of our statute, whenever, as in this case, the pleadings present a mere naked question of law, and, after a final judgment in the county court, the case is passed on exceptions to the Supreme Court, that court, in one event, have only to affirm the decision below, and, in the other, to reverse the judgment below and "render such judgment thereon as 'ought to be rendered;'" Rev. St. p. 165, § 40.

The bill farther sets forth, that "it is wholly inequitable that the 'said creditors, sending to said Ingraham such a defective execution, 'should now collect of said Pettes the amount of their said execution,' &c. This comes the nearest to charging some blame in the matter upon the defendants, of any expression in the bill. If any such charge was intended, we have only to refer to the decision at law, (13 Vt. 395,) where the same matter was urged and the court decided that the process, (although it contained a clerical error committed by the clerk of the court issuing it,) yet was a good and valid process, and "that it was the officer's duty to have executed it." But, again, the decision at law was upon the ground, that the execution truly recited the judgment as having been rendered at the June Term, A. D. 1839;—and the court say that "No one could

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'have inspected this execution without knowing what the date 'should have been.' If it be urged that Ingraham's having had knowledge of the intended date does not help the matter, for the reason that, still, he was advised and believed that the precept would not justify him,—it then resolves itself again into simply a *mistake of the law*, which has been already sufficiently commented upon.

The opinion of the court was delivered by

REDFIELD, J. We do not deem it important to go much at length into the reasons of the decision in this case, in denying the relief sought. The court have sought industriously for some good ground for granting the relief asked, but find none.

The first ground, upon which the case is put by the counsel for the orator, is, that the court refused to grant a review in the case at law, when the orator Pettes was entitled to it; and that this was done in the hurry of closing up the term in order to go into the next county. I have no doubt we do a great many things, at such times, which need revision and correction,—but it is certainly a new doctrine, that such errors may be corrected in a court of equity. When a case is carried through to the court of last resort, and is not fairly and fully heard, and is consequently decided wrong, bring a bill in equity, and let the chancellor of the judicial circuit sit, as a court of error, upon the decisions of this court! The idea is too preposterous to be seriously entertained by any one, whose mind is not swayed by interest, or feeling. I have myself felt pressed by the severe hardship and obvious injustice of this case, and would willingly have sought out some remedy for the orators;—a majority, certain, if not all of the members of the court, who participated in the hearing, expressed the same opinion.

But, conceding all the facts, upon which the orator's counsel based their claim for relief, it seems too gross a departure from established rules, to reverse the decision at law by an application to a court of equity. The judgment at law is conclusive, unless there was some peculiar equity, which could not have availed at law, or unless the orators have been deprived of a fair and just hearing; in the case by fraud, accident, or mistake; *Emerson v. Udall*, 13 Vt. 477, and cases there cited. Nothing of this kind is pretended, unless the accident, or mistake, of the court, in making a "*hurried*," or a

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wrong decision, is included in the exception,—which will hardly be contended;—for, if that were the case, no judgment of any court could ever be relied upon as final; there might always be something objected to the character, or conduct, or decision of the court. This court, too, still remain of opinion, that the review was correctly denied,—which, indeed, we do not think important, as the denial itself made the law of that case; *Fowler v. Pratt*, 11 Vt. 369.

The remaining ground, upon which the court have been urged to grant relief, seems to us to have been presented by the counsel in somewhat stronger light than it will bear. It seems to be supposed, by the counsel, to be the *ordinary case* of relieving from the consequences of a mistake of law. But, upon examination, it will appear that this is not such a case as courts of equity have ever granted relief in. Relief has sometimes, though not usually, been granted, when a party has suffered loss in a *contract*, in consequence of a mistake of the law. But I have never found any case, in which a party has committed a tort in consequence of a mistake, either of law, or fact, and the other party was not in fault, that a court of equity has interfered to relieve the party from the legal consequences of his tortious act. And if this could, by any possibility, be done, it seems it should be done before a final judgment at law. But the truth is, no court of equity would sit to relieve a man from the consequences of his acts, or *omissions*, of a tortious nature, any more than it would, to relieve against the disappointments consequent upon the change of the seasons, the winds, or the tides.

It is truly unfortunate that the orator Ingraham did not commit the debtors in the defendant's execution; for the worst, that could have resulted to him, would have been an action for false imprisonment, with nominal damages and nominal costs. But the other alternative, if the execution did turn out to be legal, exposed him to the certainty of paying the entire debt, unless the [court should grant relief, by distinguishing it from the ordinary case of one wholly neglecting to serve an execution,—which, it seems, they did not, but gave judgment for the whole sum. And in a doubtful case, when the consequences of mistake might be so fearful, it would certainly be most prudent to take the safe side of the dilemma. But Ingraham, upon advice which he deemed safe, chose to risk all,—and lost all.

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It does not seem to the court that there was any blame on the part of the defendants, in putting a defective execution into Ingraham's hands. The defect was merely a clerical one, one not the most wonderful of occurrence, and one which was doubtless unknown to all, until discovered by Ingraham too late to correct it. Under such a state of facts, it would hardly do to charge blame upon the defendants, as having virtually decoyed Ingraham into this error;—and if there were any proof of such conduct on their part, or that of their agents, or attorneys, it would have afforded a perfect defence at law;—but, in truth, there is no satisfactory evidence of even neglect on the part of any one, but the clerk, in regard to this defect. There does not, then, seem to be any ground of redress in this proceeding.

After spending considerable time in reflecting upon this case, it seems to me, that, if there was any point, at which redress could have been afforded Ingraham, it was in giving him a hearing in damages in the action at law; which would have been just and reasonable; and, if that question were now before me, I confess I should be inclined to hesitate, before rendering judgment for the full amount of the execution. That question does not appear to have been brought to the consideration of the court in particular, and probably was not much considered. It came so near to the cases of voluntary neglect of an officer to levy an execution, which had been already settled by this court, that it was not thought practicable to distinguish them. But, upon farther reflection, it seems to me that the cases are distinguishable upon sound grounds, and that the fact that Ingraham did proceed to arrest the bodies of the debtors, and carry them to prison, and then only failed to commit them from a defect in the execution, although merely clerical, should have entitled him to reduce the damages to the loss actually sustained by the defendants.

But this ground of relief is not alleged in the bill, and does not seem, by the report of the case, to have been presented to the court, and may not be sound; but if it is not, then there does not seem to me to have been any remedy, ever in the power of the orators. And if that had been a good defence at law, it would be no ground of relief here; and there is no mode of opening the case at law;—so that the case, although a hard one, does seem to be remediless.

Decree of the chancellor affirmed, with costs.

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORANGE.
MARCH TERM, 1845.

PRESENT.
HON. STEPHEN ROYCE,
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. MILO L. BENNETT,
HON. WILLIAM HEBARD, }

WILLIAM S. CHURCHILL v. TOWN OF WEST FAIRLEE.

An individual cannot sustain an action against a town, for support afforded to a pauper having a legal settlement in such town, when there is no evidence that the support was afforded at the express request of the town, and there has been no subsequent promise to pay.

INDEBITATUS ASSUMPSIT. The declaration was for work and labor, and for money paid, laid out and expended by the plaintiff for the defendants, at the defendants' request, in the support and maintenance of one Austin F. Churchill, who was described, in the declaration, as a pauper, having his legal settlement in said town of West Fairlee. Plea, the general issue, and trial by jury.

Churchill v. West Fairlee.

On trial it appeared, from the evidence, that the said Austin F. Churchill was a son of the plaintiff, about thirty years of age, and resided in the family of his father, in West Fairlee, and that his legal settlement was in that town; that he was blind, and poor, and in need of relief; and that he had hitherto been supported by the plaintiff, at an expense of about two dollars per week. It was admitted, also, that the father had but little property. It also appeared that the plaintiff, in the winter, or spring, of 1843, gave notice to the overseer of the poor of West Fairlee that the town must support the said Austin; and the plaintiff gave evidence tending to prove, that, in the latter part of March, 1843, the overseer of the poor of said town came to the house of the plaintiff, and said to the plaintiff that he had come to make a bargain with him about his son until town meeting, and that, when the town meeting was called, he would bring the business before the town; and that they both then agreed to let the matter rest until the town meeting,—the plaintiff saying to the overseer that he did not wish to do any thing to render void his application for relief.

The county court decided that the plaintiff could not recover, without proof of an express promise by the defendants to pay for the support of his son, and that the evidence in the case had no tendency to prove an express promise, and directed the jury to return a verdict for the defendants. Exceptions by plaintiff.

S. Austin for plaintiff.

L. B. Peck and *J. W. D. Parker*, for defendants, cited *Aldrich v. Londonderry*, 5 Vt. 441; *Ives v. Wallingford*, 8 Vt. 224; *Castleton v. Miner*, 8 Vt. 209; *Houghton v. Danville*, 10 Vt. 537.

The opinion of the court was delivered by

HEARD, J. The only question arises upon the construction of the first section of the statute, in relation to the liability of towns to support paupers. The statute is, that "Every town shall relieve and support all poor and indigent persons, lawfully settled therein, whenever they shall stand in need of relief." The other part of the statute has defined what facts shall constitute a *legal settlement*; and the *liability* of towns, in that respect, must be determined by law. But

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whether the person applying *needs relief* depends upon a great variety of circumstances; and therefore the towns themselves, or their agents, must judge in that respect.

The Revised Statutes, in this respect, are not essentially different from the statutes in force previous to their enactment; and it therefore becomes unnecessary to go into any reasoning upon the subject of the liability of towns,—as that question has been so frequently decided. Towns are only liable upon an express contract; and however much they may be wanting in that principle of *liberality* and *benevolence*, that is manifested in the provisions of the statute, this court cannot arraign them in the *forum of honor, or conscience*, to compel them to do that, which either of those tribunals would award.

This case comes within the principle of so many adjudged cases, that there is nothing left to be said, except that the judgment of the court below was correct and is affirmed.



J. C. HICKS & Co. v. DANIEL CRAM AND NATHANIEL HUTCHINSON.

A person, who suffers himself to be held out to the world as a partner in a firm, will be liable for all debts which the firm contract upon the joint credit of themselves and him; and this is especially true, when he represents himself as a partner in the firm, and that to the very persons who seek to charge him, and who gave credit to the firm mainly upon his responsibility.

A person is always estopped from denying the truth of a fact, upon the faith of which he has suffered another person to act, knowing at the time that the other's conduct was materially influenced by a reliance upon the truth of such fact. This is almost the only ground of an estoppel *in pais*.

The omission to join, in an action, one of two or more joint contractors is no ground of defence on trial; and it would not be good ground for abating the suit, even, if the person omitted were a silent partner with the other defendants, or if the fact of his liability were kept concealed from the plaintiffs by the other defendants.

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If a witness, in a deposition, introduce his testimony by detailing a statement made by a person not a party to the suit, and then say that the party, against whom the testimony is offered, "affirmed all that the other person had said," the deposition is admissible in evidence.

Where, in an action against two, charging them as partners, evidence has been given to prove that one, who denies his liability as partner, had so held himself out as partner, as to enable the other defendant to pledge their joint credit, if he chose, evidence is admissible to prove that the latter, in the absence of the former, represented the former to be his partner, to the plaintiffs, as tending to prove that the plaintiffs relied upon the joint credit of the two, and to rebut evidence, previously introduced by the defendants, tending to prove that the plaintiffs relied upon the credit of one of the defendants and of a third person.

Hearsay, or common reputation, or the belief of the witness founded upon such a basis, is not competent evidence to prove that certain persons were partners.

INDEBITATUS ASSUMPSIT for goods sold and delivered. Plea, the general issue, and trial by the jury.

The plaintiffs claimed to recover for goods sold to the defendants in October and December, 1841, and in May, 1842. On trial, the plaintiffs, to support the issue on their part, introduced evidence tending to prove that the defendants were partners in trade, doing business at Braintree, under the firm of Cram & Hutchinson, and that the merchandize, to recover the price of which this action was brought, was purchased by the defendant Cram and by agents, duly authorized for that purpose by the defendants, on the joint credit of the defendants; and also that the defendant Hutchinson, before any of the said merchandize was delivered, held himself out and represented himself to the plaintiffs to be the partner of the defendant Cram, and that he represented to the plaintiffs that he and Cram were doing business in Braintree under the firm of Cram & Hutchinson.

The defendants introduced evidence tending to prove that Nathaniel Hutchinson was not a partner with Cram, and that he was in no way interested in the firm of Cram & Hutchinson, but that that firm consisted of the said Cram and John Hutchinson, 2d, who was the son of Nathaniel Hutchinson, and that John Hutchinson was publicly known and recognized as such partner in Brain-

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tree and its vicinity, and that in December, 1841, when the second bill of goods was purchased of the plaintiffs, Cram informed the person then employed in the plaintiffs' store that said John Hutchinson was his partner.

The plaintiffs then introduced testimony tending to prove that the information, so given by Cram to the person employed in the plaintiffs' store, did not reach the plaintiffs, nor their principal salesman; and, to rebut any such presumption, they offered, among other evidence, the deposition of Henry A. Reed, who testified, that, in May, 1842, at the time the last bill of goods was purchased, Cram informed the plaintiffs that Nathaniel Hutchinson was his partner. To the admission of this deposition the defendants objected, but the court overruled the objection and admitted the deposition.

The plaintiffs also offered the deposition of John Preston, who testified that in September, 1841, he was salesman for the firm of Curtis & Merriam in Boston, and that he had before sold goods for that firm to one Howe of Braintree, who was agent for one Loomis, of said Braintree, and that at that time Howe came to the store of Curtis & Merriam, and told the witness that Loomis had sold out to the firm of Cram & Hutchinson, in Braintree, and that Nathaniel Hutchinson, one of said firm, was then in Boston, and that Cram & Hutchinson had assumed the debts of Loomis, and that this firm was much better than Loomis, as Hutchinson was a man of property; and the witness farther testified that the said Nathaniel Hutchinson was introduced to him, "and affirmed all that Howe had previously stated, and authorized the firm of Curtis & Merriam to charge all the goods, that Howe, as their agent, should purchase for Cram & Hutchinson, to Cram & Hutchinson." The defendants objected to the admission of this deposition also; but the objection was overruled by the court, and the deposition admitted.

The plaintiffs then offered the deposition of John M. Lyman, who testified, that, in 1841, and for some time previous, he lived in Braintree, and was a clerk in different stores there; that prior to October, 1841, he was informed by the said Howe that Loomis had sold out his store to Cram & Hutchinson; that Cram & Hutchinson gave him an order to purchase goods for them of the plaintiffs, in October, 1841, in Boston; that, while purchasing the goods of the plaintiffs, he was

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asked as to the circumstances and responsibility of Cram & Hutchinson, and told the plaintiffs that he considered the firm good and responsible; that in November, 1841, he agreed with Howe to act as clerk in the store of Cram & Hutchinson during the ensuing winter, and did so act for a few weeks, and until he was obliged, by other business, to leave; that he continued to reside in the same village until the March following; that he never heard a suggestion that John Hutchinson, 2d, was one of the firm, until after the failure of the firm, when he heard, at Corinth, where he then resided, that Nathaniel Hutchinson was not one of the partners, but that the firm consisted of Cram & John Hutchinson; and that he could not recollect that he was ever informed by Howe, Cram, Nathaniel Hutchinson, or John Hutchinson, who constituted the firm of Cram & Hutchinson, but that he "came to the conclusion from the remarks of townsmen and his knowledge of the circumstances of Nathaniel Hutchinson, and John Hutchinson, 2d." To the admission of this deposition the defendants also objected; but the objection was overruled by the court, and the deposition was admitted.

The plaintiffs also introduced evidence tending to prove that Nathaniel Hutchinson, from September, 1841, to June, 1842, owned and occupied a large farm in Braintree, and was also the owner of a valuable tavern stand, and that the said John Hutchinson was twenty two years old in August, 1841, and did not profess to be worth property to any amount.

The defendants requested the court to instruct the jury, that, if they found that Nathaniel Hutchinson was not the partner of Cram, but that the partner was John Hutchinson, the plaintiffs could not recover; and that, if they should find John Hutchinson was the partner with Cram, although they should also find that Nathaniel Hutchinson represented himself to the plaintiffs as such partner, the plaintiffs could not recover in this action, as, in that case, John Hutchinson was jointly liable with Cram and Nathaniel Hutchinson, and should have been joined as defendant; and that, as he was not joined, there was a variance between the proof and the declaration.

But the court refused to instruct the jury as requested, but did instruct them, that the plaintiffs would be entitled to recover of the defendants for the amount of such goods as were delivered to the

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credit of Cram & Hutchinson upon the representation of Nathaniel Hutchinson that he was the partner of Cram, though the jury should in fact find that the said Nathaniel was not the partner of Cram, and never had any interest in the concern, but that the real partner of Cram was John Hutchinson.

The jury returned a verdict for the plaintiffs. Exceptions by defendants.

J. P. Kidder, L. B. Peck and L. B. Vilas for defendants.

1. The deposition of Henry A. Reed ought not to have been admitted. It was admitted to affect the rights of Nathaniel Hutchinson, when it only tends to show what Cram said without the knowledge, or authority, of Hutchinson?

2. The deposition of John Preston is clearly inadmissible. It is almost wholly hearsay testimony. The witness says that the defendant Hutchinson affirmed all that Howe had previously stated. Can any authority be found for testimony of this character.

3. There is not a word in the whole deposition of John M. Lyman, that can be regarded as legal testimony in this case; but still it might affect the case materially with the jury. It, in effect, gives the opinion of the witness, that Nathaniel was the partner, but that "he came to the conclusion," not from any legitimate source, but "from the remarks of townsmen and his knowledge of the *circumstances* of Nathaniel Hutchinson and John Hutchinson 2d."

4. The defendants were entitled to the charge requested. The defence was, that the firm consisted of Cram & John Hutchinson, 2d, and that Nathaniel Hutchinson never was a partner; so that it was not necessary to plead in abatement the nonjoinder of John;—and, having established that fact, the defence was complete. But the court charged the jury, that, if this was so, yet, if Nathaniel represented himself as a partner, the plaintiff must recover. If the firm consisted of Cram & John Hutchinson, how could Cram be adjudged the partner of another without his knowledge, or consent? for there is no pretence that Cram knew or consented to any such representations of Nathaniel. The true doctrine is, in holding a person, who is not in fact a partner, all the known partners must be sued, and then those who have held themselves out to the world as such may be held liable with them; but it is believed that no case can be

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found, where a pretended partner has been substituted for the real one.

E. Weston and W. Nutting for plaintiffs.

1. The plaintiffs contend that the charge of the county court was correct. Collyer on Part. 421 *et seq.* *Stearns v. Haven et al.*, 14 Vt. 540. The non-joinder of John Hutchinson could not be taken advantage of, even by plea in abatement, if the plaintiffs did not know that he was a partner, and trusted the defendants only. *Baldney v. Ritchie*, 2 E. C. L. 416. *Stansfield v. Levy*, 14 E. C. L. 146. 1 Chit. Pl. 30-32.

2. The testimony, relative to what Cram told the plaintiffs in May, 1842, was rightly admitted to rebut any presumption of notice, which might arise from what was said in the plaintiffs' store in December, 1841; and the deposition of Reed was offered and admitted for no other purpose.

3. The other depositions were proper testimony in the case.

The opinion of the court was delivered by

REDFIELD, J. The only point in dispute in this case, before the jury, seems to have been, whether the firm of Cram & Hutchinson consisted of Cram and Nathaniel Hutchinson, or of Cram and John Hutchinson. The suit being brought against Cram and Nathaniel Hutchinson, the effort of the plaintiffs was, to make proof of his liability, both on account of the costs, which would be lost in bringing a new suit, and also from the fact that Nathaniel Hutchinson was responsible,—Cram and John Hutchinson being understood to be insolvent.

1. We think the court decided correctly in regard to the effect of Nathaniel Hutchinson's representing himself to be the partner of Cram,—and especially to the plaintiffs,—that it was sufficient to make him liable as partner, if the credit were given to the defendants under the expectation that Nathaniel Hutchinson was one of the firm, at the time the credit was given. This is the kind of evidence usually resorted to by third persons, to prove a partnership, and all that ordinarily can be shown by them. It is the representing one's self, or suffering one's self to be represented, as a partner, that creates a liability to third persons; and this is sufficient to create a

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liability, notwithstanding the truth should prove to be, that the person, so suffering himself to be held out as partner, in fact was not so. This is in order to preserve good faith and prevent fraud, and is almost the only ground of an estoppel *in pais*. If one man has made a representation, which he expects another may, or will, act upon, and the other does in fact act upon it, he is estopped to deny the truth of the representation. So, too, equally, when one remains silent and suffers another to make the representation. In a recent English case,—*Sanderson v. Collman*, 43 E. C. L. 115,—it was held, that, under the new rules of pleading there, estoppels *in pais* may be pleaded specially. That is not necessary, and not usual in our practice, and could not conveniently be done in most cases.

2. The second point, made in the case, is, that, notwithstanding these representations, if John Hutchinson was in fact the partner, no recovery can be had in this suit. But the court do not consider this position well founded. Notwithstanding the firm in fact consisted of Cram and John Hutchinson, Nathaniel, by representing himself to be a partner, became liable for such debts as they contracted on their own and his credit jointly. The suit, then, being brought against two, only, of three joint contractors is no ground of defence on trial, and would not be good ground for abating the suit, if the plaintiffs were ignorant of the liability of John Hutchinson,—as if he had been a silent partner, or if the fact of his liability had been kept from the plaintiffs by Cram and Nathaniel Hutchinson.

3. In regard to the depositions,—1. That of Preston is well enough. It states that Howe asserted to another firm in Boston, that the firm of Cram & Hutchinson consisted of Cram and Nathaniel Hutchinson, and that they had agreed to assume the debts of one Loomis to that firm. Nathaniel Hutchinson was afterwards introduced, at the store of that firm, to this deponent, he being their salesman, “and affirmed all that Howe had previously stated,” and authorized that firm to charge Loomis’ debt to them. This is sufficiently definite. It must mean, either that Nathaniel Hutchinson re-asserted identically the same things that Howe asserted, or that he expressly assented to their truth.

2. The deposition of Reed, that, at the time Cram took up the last bill of goods, he asserted that Nathaniel Hutchinson was his partner, might have been competent evidence, to show that the

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plaintiffs delivered the goods upon the credit of Cram and Nathaniel Hutchinson, and to rebut the defendants' evidence, that they were in fact purchased upon the credit of Cram and John Hutchinson,—there being already sufficient evidence in the case to justify Cram in thus pledging the credit of Nathaniel Hutchinson, if he chose to do it.

3. There is more difficulty in regard to the deposition of Lyman. This deposition was objected to generally, and admitted. This decision of the court, upon the most favorable construction, must be considered equivalent to saying, that the deposition contained *some* evidence, competent to be weighed by the jury; and as no part of it seems to have been excluded from the consideration of the jury, the natural conclusion would be, that the jury would consider it all competent evidence.

The evidence of this witness, so far as it affects the main point in the case, seems to have been altogether hearsay, or common reputation in the neighborhood,—neither of which is competent to prove the *fact* of a copartnership. 1. The witness states minutely his intimacy with the business of the firm for many months, without saying that he knew which of the Hutchinsons was the partner,—which he could easily have done, if such had been the fact. 2. That, being inquired of by the plaintiffs, he told them *he considered* the defendants perfectly responsible,—which is, doubtless, understood by all as equivalent to an assertion that *he considered* Nathaniel Hutchinson the partner;—but why so? That is left to conjecture. 3. That he never heard a suggestion that John Hutchinson was the partner,—which is equivalent to saying that *every body considered* that Nathaniel Hutchinson was the partner,—until the witness left for Corinth. 4. He was never told by either of the Hutchinsons, or Cram, or Howe, who constituted the firm, but he founded his opinion upon “*the remarks of townsmen and his knowledge of the circumstances of the Hutchinsons*.” This testimony was clearly incompetent, and very well calculated to mislead the jury.

Judgment reversed, and new trial.

Mixer et al. v. Williams.

MIXER & WHITEMORE v. ABEL S. WILLIAMS.

Where the defendant contracted to deliver to the plaintiffs thirty tons of starch per year for two years, it was held that the contract, though entire in its terms, was yet divisible in its character, and that the plaintiffs might, at the expiration of the first year, sustain an action against the defendant for any breach, on his part, of that portion of the contract that was to be performed that year.

When, in an action on contract, the testimony is all on paper, and is before the court, it becomes the duty of the court to instruct the jury, as a question of law, whether the testimony, all being true, proves the contract alleged,—and, if the contract is not proved, as alleged, to direct the jury to return a verdict for the defendant.

In this case the testimony was, that the defendant, a starch manufacturer, authorized the plaintiffs, who were commission merchants in Lowell, to contract for him thirty tons of starch per year for two years, and that the plaintiffs, having *previously* contracted to deliver to the "Boot Mills," a corporation in Lowell, sixty tons of starch in one year, for thirty tons of which they had contracted with another starch manufacturer, thereupon *appropriated* the amount specified by the defendant for the first year to meet the remaining thirty tons to be delivered by them to the "Boot Mills," and notified the defendant that they had contracted his starch, as he had authorized them to do,—and it was held that this evidence did not support a declaration, in which the plaintiffs set forth the authority given them by the defendant and then alleged, that, relying upon that authority, and the promise of the defendant to deliver the starch according to its terms, they had contracted with the "Boot Mills," "and with certain other individuals and corporations in Lowell," for the sale and delivery to them of the quantity of starch mentioned by the defendant, to be delivered at the times and on the terms proposed by him.

And it was farther held, that this evidence did not support a count in the declaration, which alleged that the defendant *bargained and sold to the plaintiffs* the amount of starch specified in his proposal to them, upon the terms and at the price mentioned by him.

And it was held that this second count was not supported by evidence that the plaintiffs, after they had given notice to the defendant that they had contracted his starch, prepared and forwarded by mail to the defendant a memorandum of an agreement, purporting to be an agreement by the defendant to deliver to the *plaintiffs* the quantity of starch specified by him, upon the proposed terms as to price and time of delivery, and requested him to sign and return the same, and that he wholly neglected to do so.

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ASSUMPSIT. The plaintiffs alleged, in the first count in their declaration, that the defendant, on the 30th day of June, 1841, requested the plaintiffs to contract for him for the sale of a large quantity of starch, to be delivered by him at Lowell, Massachusetts, to wit, thirty tons per year for two years from the first of October, 1841, to be delivered by him in quantities of not less than six nor more than eight tons per month, to be paid for at the rate of four cents per pound, as the same should be delivered; that the defendant, in consideration that the plaintiffs would so contract, promised to deliver the starch in the quantities and on the terms above mentioned; that the plaintiffs, relying upon this promise, did afterwards, to wit, July 14, 1841, contract with a corporation in Lowell, known as the "Boot Mills," and with certain other individuals and corporations in Lowell, for the sale and delivery of sixty tons of starch, to be delivered in the quantities and at the times above named; that the said corporations and individuals agreed with the plaintiffs to receive, and the plaintiffs bound themselves to said corporations and individuals to deliver, said starch in the quantities and on the terms specified,—of which the defendant had notice; but that the defendant had never delivered any portion of said starch, although the time for the delivery of thirty tons of it had elapsed. In the second count the plaintiffs alleged that the defendant had bargained and sold to them sixty tons of starch, and had promised to deliver the same to the plaintiffs, at Lowell, in the quantities and on the terms specified in the first count, but that he had neglected and refused to deliver any portion thereof. Plea, the general issue, and trial by jury.

On trial the plaintiffs gave in evidence a letter from the defendant to the plaintiffs, dated May 8, 1841, which was in these words; "Gent. I wish you to write to me and let me know what you can 'do for me for two years, or three years, and I will give you an answer, when we send the remainder of our starch,'" &c. Also, a letter from the plaintiffs to the defendant, dated May 14, 1841, which was in these words; "Sir. Your favor of the 8th May 'was duly received. * * * In regard to contracting two or three 'years, we can say nothing different from what we said in our last. 'We can contract from thirty to fifty tons per year for three years, 'at four cents; but you must fix the amount it shall be per year.

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'To contract *what you make* would not make them sure of any. The 'object of making a contract beforehand is, to be sure of receiving 'a certain amount, for the time agreed on, at a fixed price." Also, a letter from the defendant to the plaintiffs, dated June 16, 1841, which was in these words; "As respects contracting starch for one 'or two years, I will say from 20 to 25 tons per year for one or two 'years, in case I can send it as fast as I make it,—which would be 'from six to eight tons per month,—for four cents, if you cannot 'sell it for any thing more than that." Also, a letter from the plaintiffs to the defendant, dated June 24, 1841, in these words; "Sir, We have a chance to contract for you thirty tons of starch 'per year, for two years, at four cents, commencing next October, 'and will allow you to put it in as fast as you make it, if not over 'eight tons per month, nor less than six tons. They want that 'amount, or none, as they wish it all of one man's make. We can- 'not contract for any more than four cents at present, as there is 'plenty of it offered at that price. Please write by return of mail, if 'you wish us to make the contract for you." Also, a letter from the defendant to the plaintiffs, dated June 30, 1841, in these words; "Gent. I received yours of the 24th, stating you could contract my 'starch for two years, 30 tons per year, for four cents; that is rath- 'er low, but I have concluded to let you contract for that, if you 'cannot do any better, and deliver it as you proposed, excepting the 'first month; * * * but, if the weather will admit, I will deliver 'the six tons in October next." Also, a letter from the plaintiffs to the defendant, dated Aug. 2, 1841, enclosing a memorandum of a contract, according to the terms specified in the letters above, with a request that he would execute and return the same. Also, a letter from the plaintiffs to the defendant, dated Sept. 25, 1841, in these words; "Sir, Will you please inform us how soon in October 'we may expect the first load of starch to be delivered on the con- 'tract made for you for the 30 tons of starch per year for the next 'two years, commencing in October next. Your reply by return of 'mail will oblige," &c.

The plaintiffs also introduced two depositions of Isaac Pitman, who was their clerk in 1841, and who testified, in substance, as follows. In February and March, 1841, the plaintiffs, who were commission merchants at Lowell, Massachusetts, were making contracts with

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the several manufacturing companies at Lowell, for supplying them with starch the ensuing year, and, among others, with the "Boot Mills," to furnish them with 60 tons of starch, of which one Melvin had contracted to furnish to the plaintiffs 30 tons. Upon the receipt of the defendant's letter of June 30, 1841, the plaintiffs appropriated the starch to be made by the defendant to the contract with the "Boot Mills," and relied upon it for that purpose. The plaintiffs had contracted to receive of Hall & Palmer 30 tons of starch; and when the contract was made by them with the "Boot Mills" they at first assigned this lot, to be delivered to the "Boot Mills" in part performance of the contract. But, upon the receipt of the defendant's letter of June 30, a change was made in this arrangement for his accommodation, the "Boot Mills" being willing to receive six or eight tons per month,—the supply expected from him. By the practice of the plaintiffs, in their business, these applications were not final. They arranged their supplies to meet the demand in the whole; and the supply, for two years, expected from the defendant, was required, to meet the contracts for delivery which they had assumed during that period of two years. The arrangement was always made by them by such application of one or more supplies to meet one or more demands, according to amount and quality, for convenience,—the aggregate of the supply being kept equal to the aggregate of the demand, as nearly as possible. The particular application of the supply expected from the defendant was for one year only, because that was the extent of the contract with the "Boot Mills"; but the plaintiffs' arrangement of contracts to deliver starch was adapted to the supply expected from the defendant for two years. Soon after the receipt by the plaintiffs of the defendant's letter of June 30, another starch manufacturer applied to the plaintiffs to dispose of fifty tons of starch for him,—which they declined doing, relying upon the instructions contained in that letter. No starch was sent by the defendant to the plaintiffs after the receipt by them of that letter, and, in consequence of this, the plaintiffs were obliged to purchase starch to complete their contract with the "Boot Mills," and did purchase to the amount of thirty tons, and paid therefor the then cash price in the market, which varied from four cents and three fourths to five cents per pound. This excess, paid by the plaintiffs above the price at which the defendant

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was to deliver his starch, together with their commission of two and a half per cent. for making the sale, amounting in the whole to \$530.53, the plaintiffs claimed as damages from the defendant, and an account thereof was rendered to him from time to time, as the purchases were made.

Upon this testimony the court instructed the jury that the plaintiffs were not entitled to recover, and a verdict was accordingly returned in favor of the defendant. Exceptions by plaintiffs.

L. B. Peck for plaintiffs.

1. The correspondence between the parties sufficiently shows the plaintiffs' authority to contract the starch in the manner stated in the declaration. The depositions, it is true, do not, in terms, state that the defendant's starch was specifically contracted, or that the second year's lot was to be delivered monthly; but it is evident that the defendant, under the contracts made, would have had the right to deliver his starch in the quantities stated in the declaration. It cannot be said that there is a *material* variance.

2. May not this be regarded as a contract of sale by the defendant to the plaintiffs, and the latter be permitted to recover under the second count? Such it is in effect. The plaintiffs could not contract for the sale of the starch on the defendant's responsibility. They were obliged to and did bind themselves personally for the delivery.

3. On the merits of the case there would not seem to be much doubt of the plaintiffs' right to recover. The defendant's letters authorized them to sell his starch, and they did so, and he was duly apprised of this fact. This court, at its last term in this county, held that the letters of August and September were evidence, tending to show that the defendant was duly notified of the sale. This was, in effect, saying that the agreement between the parties was so far consummated, that the plaintiffs had the right to contract the starch and bind the defendant for its delivery.

L. B. Vilas and Kinsman & French for defendant.

1. The construction of the depositions and correspondence between the parties was a question of law; and it was within the province of the court to put a legal construction upon it.

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3. On the merits of the case there would not seem to be much doubt of the plaintiffs' right to recover. The defendant's letters authorized them to sell his starch, and they did so, and he was duly apprised of this fact. This court, at its last term in this county, held that the letters of August and September were evidence, tending to show that the defendant was duly notified of the sale. This was, in effect, saying that the agreement between the parties was so far consummated, that the plaintiffs had the right to contract the starch and bind the defendant for its delivery.

L. B. Vilas and Kinsman & French for defendant.

1. The construction of the depositions and correspondence between the parties was a question of law; and it was within the province of the court to put a legal construction upon it.

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2. The testimony does not show that the plaintiffs made any contract whatever for the defendant. Theob. Pr. & Ag. 18. In order to make the defendant liable in this case, and entitle the plaintiffs to recover damages, they must show that they made a definite contract for the defendant for the sale of his starch, and to whom they sold it, and that it was such a contract as the defendant authorized them to make, so that the defendant might know whom he had to deal with, and to whom he could look for damages, if there was a failure on the part of the purchaser. Theob. Pr. & Ag. 241, 358, and cases there cited.

3. There was a material variance between the proof and the plaintiffs' declaration. The declaration states that the plaintiffs made a contract with the Boot Mills and other corporations and individuals in Lowell. The proof does not show that they ever made any contract with any one; and they do not pretend that they made any for more than one year. *Vail v. Strong*, 10 Vt. 457.

4. There cannot be any pretence, from all the testimony in the case, that there was any sale for the defendant's starch consummated. The most that can be made out of the testimony, is, a proposition on the part of the plaintiffs to purchase for themselves the defendant's starch. Now it is a fundamental rule, applicable to both sales and purchases, that an agent, employed to sell, cannot make himself the purchaser, nor, if employed to purchase, can he be the seller. Theob. Pr. & Ag. 219, 357, 362. *Wright v. Dannah*, 2 Campb. 203. 2 Chitty Rep. 205. 1 Swift 332.

The opinion of the court was delivered by

HEBARD, J. The defendant, in argument, has started a preliminary question, that, as this was an entire contract, the plaintiffs could not sustain this action, until the time for fulfilling the contract had expired. That principle of law is correct, when correctly applied. This was an entire contract, but was divisible into parts, and was like a contract for the payment of money by instalments; and so the right of action accrues, whenever there is an instalment due, and admits of successive actions for each *breach*, or failure, to perform the contract.

The question in the case, before the court, is, whether the testimony *sustained* either count in the declaration; and not whether it

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tended to sustain it. The testimony was all on paper, and was before the court, and, as a question of law, it became the duty of the court to instruct the jury whether the testimony, all being true, proved the contract alleged. When an objection is taken to the *admission* of testimony, then the question of *tendency* is involved.

In relation to the first count, we find no difficulty in making out the authority from the defendant to the plaintiffs to contract his starch, as therein set forth; but the difficulty is, in finding the evidence that they did so contract it. If it is to be found, it is in the deposition of Isaac Pitman. By this it appears that the plaintiffs were already under contract with the "Boot Mills" to deliver to them sixty tons of starch per year,—thirty tons of which the plaintiffs had contracted for with one Melvin,—and that upon the receipt of the defendant's letter of June 30, authorizing the plaintiffs to contract his starch, the plaintiffs *appropriated* the starch to be made by the defendant to the contract with the "Boot Mills." This falls short of proving the allegation in the writ. The only contract the plaintiffs made with the "Boot Mills" was made before the 30th of June, and before the defendant had authorized them to contract his starch; and at the time the plaintiffs contracted with the "Boot Mills," they not only had no authority to contract the defendant's starch, but they did not do so in fact.

In relation to the second count, a part of the same remarks will apply. This counts upon a contract of sale from the defendant to the plaintiffs. The proposition from the plaintiffs to the defendant and the authority back, in the letter of June 30, were to contract for the sale of it to others; it was not, therefore, a contract to sell to the plaintiffs. The plaintiffs rely upon the memorandum of sale, sent to the defendant for him to sign and return. The letter containing this memorandum and a subsequent letter, of Sept. 25, from the plaintiffs to the defendant, were held by this court, a year since, as being notice to the defendant that the plaintiffs had contracted his starch. Their having authority to contract, and giving notice back that they had contracted, does not relieve the difficulty. While claiming damages for a violation of the contract on the part of the defendant, the plaintiffs must prove that they contracted the starch, as they were authorized to do, and as they gave notice that they had done. This they have failed to do.

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The memorandum contained the terms of a contract between the plaintiffs and the defendant; and it is urged that the defendant's neglect to answer or return the memorandum is to be taken as evidence that he assented to the terms of it. The converse of this I should hold, as being the most tenable. When the plaintiffs sent this memorandum to the defendant, they requested him to sign and return it; therefore his neglect to return it would be notice to the plaintiffs that he did not ratify it.

The plaintiffs, upon their proof, are not entitled to recover upon the first count, because they did not contract the defendant's starch with the "Boot Mills" corporation, although they were authorized to do so, and notified the defendant that they had done so; and, under the second count, the plaintiffs fail to prove that any negotiation was commenced for the sale of the starch to the plaintiffs.

The judgment is affirmed.



SAMUEL LINCOLN v. AMASA BLANCHARD.

If one promise to indemnify another for all loss, damage and expense which he shall incur in giving up to the promisor a horse which he has in his possession, and bringing a suit against the person of whom he purchased it, for fraudulently selling to him a horse belonging to another, on condition that he fail in such suit, and such action is commenced, and the plaintiff fails to recover, the record of the judgment in that action is competent evidence in an action against the promisor, founded upon the promise, notwithstanding no notice of the commencement or pendency of such prior action was given to the defendant. It is evidence against the defendant, to show the bringing and the failure of the action.

In an action on such contract the plaintiff would be entitled to recover, provided he proved that he commenced such prior action, and failed to recover in it; but the amount of damages, which he is entitled to recover, must depend upon the title to the horse, and as to that question, *Per REXFIELD, J.*, the judgment in the former action would seem to be *inter alios*, and not conclusive.

In such case the consideration is sufficient to support the contract, as being both a loss to the promisee and a benefit to the promisor.

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In a declaration upon such contract, the allegation, that the plaintiff brought a suit against the person from whom he purchased the horse, is sufficient after verdict. It will be presumed that it was such a suit as was stipulated.

The difference between a title defectively stated and a defective title illustrated.

THIS was an action of assumpsit, in which the plaintiff's declaration was in these words;—"For that the plaintiff, at said Chelsea, 'on the first day of June, was possessed of a certain black gelding 'colt, two years old, which he had previously bought of one Walter M. Wilson of Brookfield, in said Orange county, which said 'colt the defendant then and there pretended falsely and fraudulent- 'to claim as his own; and, to induce the plaintiff to deliver up to 'him, the said defendant, the said colt, he then and there undertook 'and promised the plaintiff, that, if he would deliver to him said 'colt, and would bring an action against the said Wilson, claiming 'damage for fraudulently selling property not his own, and in said 'action should fail to recover damage of the said Wilson, as afore- 'said, that he, the defendant, would thereafterwards, on demand, 'indemnify and make the plaintiff good for his damage, loss and ex- 'pense in so doing. And the plaintiff avers, that, relying upon his 'said promise and undertaking, he did then and there deliver to the 'defendant said colt; and the plaintiff farther says that he did af- 'terwards sue out a writ against the said Wilson, signed by and 'returnable to Arad Burnham, Esq., a justice of the peace for the 'county of Orange, on the 19th day of July, 1842, 9 o'clock A. M., 'at the house of Philip Davis in said Brookfield, and, said writ hav- 'ing been duly served upon the said Wilson, and duly returned to 'said justice, such proceedings were thereupon had, on said 19th 'day of July, 1842, that it was then and there adjudged by said 'justice that the said Wilson was not guilty, and that he recover of 'the plaintiff his cost;"—and the declaration contained also alle- 'gations as to the value of the colt, the amount of costs and expense sustained by the plaintiff, and an averment that the defendant had refused to pay the same to the plaintiff, though requested. The de- 'fendant pleaded the general issue, and trial was had by the jury.

On trial, the plaintiff, among other evidence tending to support his declaration, gave in evidence the record and proceedings of the suit in his favor against Wilson. The defendant insisted that he

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should not be affected by the record, inasmuch as it was not proved that the plaintiff had given the defendant notice of the pendency of that suit and an opportunity to furnish evidence to sustain the action, and requested the court so to instruct the jury. But the court instructed the jury that such notice was not required, and that, if the plaintiff commenced and prosecuted his action against Wilson to final judgment, in good faith, and with the care and diligence which men of common diligence use in the prosecution of their suits, it was all that was required of the plaintiff in that respect.

The defendant also insisted, that the declaration disclosed no sufficient consideration for the promise alleged; but the court overruled the objection.

After verdict for the plaintiff the defendant filed a motion in arrest of judgment, for the insufficiency of the declaration; which motion the court also overruled. To all which decisions of the court the defendant excepted.

R. Dinsmore and L. B. Vilas for defendant.

1. The plaintiff was bound to give notice to the defendant of the pendency of the suit against Wilson. It is to be presumed, that the defendant could have furnished testimony, sufficient to have enabled the plaintiff to have recovered in that action.

2. The *consideration* of the defendant's promise is the delivery of the colt by the plaintiff to the defendant, the bringing an action against Wilson, claiming damage for fraudulently selling property not his own, and failing to recover damage therein. The *promise* is to indemnify and make the plaintiff good for his damage, loss and expense in so doing. The defendant does not promise to pay the plaintiff for the colt, nor to deliver the colt after the termination of the suit against Wilson. In order to recover the value of the colt, the plaintiff should have brought his action of *trover*, and have proved on the trial his right of property, and the *conversion* by the defendant.

3. For aught that appears in the plaintiff's declaration the entire contract between these parties was merely an attempt to defraud Wilson, and was therefore void. 1 Swift's Dig. 214. *Fetherston v. Hutchinson*, Cro. Eliz. 200. 1 Sid. 38. Oliver's Law Sum. 27.

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4. The plaintiff does not state in his declaration that he ever brought an action against Wilson, "*claiming damage for fraudulently selling property not his own*," but that he sued out a writ against the said Wilson, &c., and that such proceedings were thereupon had that it was adjudged by the said justice "that the said Wilson was not guilty." When it is necessary, on the part of the plaintiff, to aver performance, an *exact* performance must be stated. 1 Chit. Pl. 316. Where the declaration omits any independent allegation, material to the cause of action, it cannot be aided by verdict. Evidence to prove such facts, not alleged, would be inadmissible. Nothing is presumed to have been shown, but, what is expressly stated in the declaration, or necessarily implied from those facts which are stated. 1 Swift's Dig. 777. 1 Aik. B. 287. 1 Term R. 145. 7 Term R. 521.

D. F. Weymouth and L. B. Peck for plaintiff.

1. So far as the correctness of the charge in this case is concerned, it is perfectly immaterial whether, or not, a judgment, rendered between the plaintiff and Wilson, without any agreement of the defendant, or notice to him prior to the trial, would be conclusive as to the ownership of the colt, as between the plaintiff and defendant; for the plaintiff, as appears by the case, was, in effect, employed by the defendant, to try the question of ownership with Wilson; and the defendant had agreed unconditionally to be bound by the result of that trial.

2. By the terms of the agreement set forth in the declaration, and the subsequent acts of the parties, it will be seen, that there was an implied contract on the part of the plaintiff to relinquish all claim on the colt, or upon the defendant for it, or else to sue Wilson according to the offer of the defendant. *Phelps v. Stewart et al.*, 12 Vt. 263. The delivery of the colt, then, with this implied contract, which was reciprocal, constitutes an ample consideration for the promise. *Phelps v. Stewart et al.*, 12 Vt. 262. The delivery of the colt, alone, would have been a good consideration; for the bare possession of the property was a benefit; and more especially as the title was disputable, and he who had him in possession would be able, in case of a suit, to throw the burthen of proof upon the other party. The delivery of the colt, then, would

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be an injury to the plaintiff and a benefit to the defendant,—which is all that is necessary to constitute a good consideration. 2 Bl. Com. 445 and notes. 1 Com. on Cont. 12, 14, and cases there cited. *Blake v. Peck*, 11 Vt. 484.

3. This consideration is sufficiently set forth in the declaration. The expression “that if he (the plaintiff) would deliver” &c., is equivalent to the words “in consideration that he would deliver” &c., and, with the subsequent averments, that the plaintiff “did deliver” and “did sue” &c., discloses a consideration with sufficient legal certainty to be good, even on special demurrer.

The opinion of the court was delivered by

REDFIELD, J. Only two questions properly arise, in the present case, upon the bill of exceptions.

1. Was the record of the judgment, in the suit in favor of the plaintiff against Wilson, properly admitted in this action. The question is not, what shall be the effect of this record?—is it conclusive of the question of title of the horse?—but, is it admissible for any purpose? We think it is. The defendant’s undertaking with the plaintiff was not, that, if it should appear that Wilson owned the horse, he would make good the plaintiff’s loss;—but, if the plaintiff would bring the suit, and should fail to recover against Wilson in such action, he would “make the plaintiff good for his damage, loss and cost.” This promise was made upon the consideration, that the plaintiff would give up to the defendant the horse he bought of Wilson, and bring a suit against Wilson for fraudulently selling property not his own. If the plaintiff would make out his action, he must show that he *brought* the suit, and that he *failed* in it. This is all that he stipulated to do on his part. It is all that the defendant required him to do, in order to give him a claim for indemnity. To say that the plaintiff was bound to give the defendant notice of the time of trial is going *aside* and *beyond* the contract. It is, doubtless, implied, in the terms of the contract, that the suit shall be brought in a reasonable time, and prosecuted with common diligence, and that it shall fail without the fault of the plaintiff. But it no where appears that any expectation existed, on the part of the defendant, that he should have notice of the time and place of trial.

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If he knew of any testimony, it was his business to inform the plaintiff of it, and if he could render any other important aid, to offer it.

And even without this, it is by no means certain that the defendant is barred by the judgment, in regard to the title of the horse. But the contract is not made to hinge upon that, but upon the success, or failure, of the suit. The title of the horse is no otherwise important, except as it affected the event of the suit against Wilson, or as it affects the damages in this case. The suit against Wilson might fail, notwithstanding he was in fact liable; but *if it failed*, the defendant promised to *make good* "all damage, loss and expense." The damage, loss and expense would all be incurred, except the *loss* of the horse, the same, whether Wilson had good right to sell it, or not; and, by the express terms of the contract, no suit could be maintained, until the suit was brought against Wilson and had failed. The record was, then, the best, and, of course, the only evidence of the "bringing" and the "failure" of the suit. No question seems to have been made, in the court below, whether the record was proof of title of the horse in Wilson. I should, myself, think, that, as it was merely *inter alios*, except so far as the contract made it important to this case, it could not conclude the question of title.

But, upon the question of title, the *prima facie* proof was clearly with the plaintiff, aside from the record. The possession of the horse was quietly in the plaintiff, and that was good against all the world, who could not show a better title. This possession the plaintiff surrendered to the defendant for the contract, and there was no proof offered that the title was in any one else. Of course, then, the plaintiff lost his horse, and the expenses of the suit which he was, by the terms of the contract, entitled to recover against the defendant.

2. The only remaining question is as to the sufficiency of the consideration alleged in the declaration. Upon this there would seem to be no doubt. It was clearly both a loss to the plaintiff, and a benefit to the defendant, to give up to the defendant the horse, and *himself* incur the expense and perplexity of a lawsuit.

The question attempted to be made, as to the sufficiency of the allegation in the declaration, "that the plaintiff did afterwards sue out a writ against said Wilson," &c., that it is too general, is clear-

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ly with the plaintiff. This question is first made by motion in arrest of judgment. Every reasonable presumption should be made in favor of the sufficiency of the pleadings, after verdict. We are not to presume that this "writ" was in covenant, or trespass, or that it was defective, but rather that it was formal, and founded upon the alleged fraud in Wilson, as before described in the declaration. The most that can be said, in regard to the declaration, is, that the "title is defectively stated," which is cured by verdict. If it had been said that the plaintiff brought an action of *slander* against Wilson, then the declaration would have been incurably defective, as counting upon a "defective title."

Judgment affirmed.



JOHN B. PICKETT v. JOHN PEARSONS.

In the action of account the proof under the plea of *plene computavit* is somewhat different from what it is before the auditor, on the issue of *nothing in arrears*. The former defence seems to rest upon the ground of an express settlement of the dispute, and a surrender of all the property pertaining to the trust, while the latter issue is sustained by merely showing that there is nothing *now* in the defendant's hands, for which he is liable to account; which may be shown, either by proving that the property has been surrendered to the plaintiff, or to a third person, by the plaintiff's direction, or that it has been destroyed, or has perished, without the fault of the defendant.

The rules of pleading, in the action of account, laid down in *Bishop v. Baldwin*, 14 Vt. 145, recognized and affirmed.

An agent can only be held liable for neglect, in an action of account, in a case where the negligence has been gross and palpable.

An agent is only bound by the instructions of his principal as he understood them, unless there was fraud, or some fault on his part, in not comprehending them; and he will not, in the absence of all proof, be presumed to be in fault in not comprehending oral instructions to the full extent.

If an agent take a demand for collection, and receive, in payment, bills of a bank, the solvency of which he does not know, and take the guaranty of

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the debtor, with surety, that the bills are good, and, upon making his conduct known to his principal, the principal receive the money and guaranty, saying he will see what can be done with the money, and he then keep it two or three months to ascertain its value, and the bills prove to have been worth but twenty cents on the dollar at the time they were received by the agent, the agent is not liable, in an action of account, for the deficiency in the value of the bills, but the principal will be considered as having acquiesced, by his conduct, in the doings of the agent.

So where the agent, in such case, took from the debtor a note for part of the demand, instead of requiring money, as directed, and the principal received the note, and controlled it, and retained possession of it until the hearing before the auditor in an action of account against the agent, it was held that the agent could not be charged with the note in such action, as for so much money received.

ACCOUNT,—the plaintiff declaring against the defendant as bailiff and receiver. Judgment to account was rendered, and the case was sent out to an auditor, who reported as follows.

In the fall of 1841 the plaintiff agreed with the defendant, who was going to Wisconsin, that he would pay one half of his expenses, if he would transact certain business there for him,—which the defendant agreed to do; that the plaintiff thereupon delivered to the defendant certain demands for collection, and, among them, a demand against one Chickering, who resided in Wisconsin Territory, for about eight hundred dollars; that, in giving instructions to the defendant respecting the demands, the plaintiff authorized him to receive money upon them as good, or not poorer, than the bills of New York country banks, except upon the Chickering demand, and that upon that demand he must get money as good as gold and silver,—by which the plaintiff intended such current bank bills as were at par here; that the plaintiff farther authorized the defendant to discount to Chickering thirty three and one third *per cent.* on \$400 of that demand for two months; that the defendant proceeded to Wisconsin, and collected the Chickering demand, as well as a considerable amount upon the other demands; that, in settling the Chickering demand, he discounted to Chickering thirty three and one third *per cent.* upon the *whole amount* for two months, making the whole discount \$44,40, instead of \$22,20 as instructed by the plaintiff; that the defendant also received upon the Chickering de-

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mand \$535,00 in bills of the Towanda bank, and a note signed by Chickering for \$56,00, and the balance in funds about which there was no dispute, and delivered to Chickering a deed of land, which had been prepared and forwarded by him by the plaintiff, and took up a bond which the plaintiff had previously given to Chickering, conditioned for the conveyance of the same land; that, when the defendant received the Towanda bills, he did not know whether they were good, or not, he having no acquaintance with the bank, and he took a guaranty, signed by Chickering, and by one Newell as surety, by which they agreed to make up those bills as good as bills of the New York country banks; and that it was conceded that the said Chickering and Newell then were, and still continue to be, responsible for the amount specified in said guaranty.

The auditor farther reported that he found that the defendant misunderstood the plaintiff's instructions relative to the discount, and the quality of the money he was to receive on the Chickering demand, and that he understood that he was at liberty to make the specified discount upon the *whole* demand and receive money upon it, not less, in value, than the bills of New York country banks, the same as upon the other demands which he took for collection; that, at the time the defendant settled with Chickering, New York country bank bills were at a discount of five *per cent.* here; and that the Towanda bills were not then worth, at any place, more than twenty cents on the dollar, the bank having previously failed.

The auditor farther reported that the defendant returned, and called upon the plaintiff, on the fourteenth day of November, 1841, to render an account of his business; that the plaintiff then received of the defendant, and accepted, all the papers and money, except those connected with the Chickering business; that, when the defendant produced the Towanda bills, and the guaranty which he had taken, the plaintiff informed the defendant that he did not know any thing about the bills, or the bank, but that he would take them and see what he could do with the money; that the plaintiff did then take the bills and guaranty, and also the \$56 note, and set about inquiring respecting the money, inquiring at the Haverhill Bank, N. H., at Boston, and at the City of New York, and that, in the course of the then next winter, he ascertained that the said bills were not worth more than twenty cents on the dollar; that the

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plaintiff did not speak to the defendant upon the subject until about a month after he received the bills and guaranty, and that, after that, he occasionally advised the defendant of his progress in ascertaining the facts relative to the bills; that as soon as the plaintiff had ascertained that the Towanda Bank had failed before the defendant received the bills, and had learned the value of the bills, he notified the defendant of these facts, and requested him to settle the matter with him and make up the money as good as that the plaintiff had instructed him to receive,—which the defendant declined doing; that the plaintiff had kept the bills and guaranty, and never offered to return them to the defendant, until the time of the audit, at which time the defendant declined receiving them; that the plaintiff had also retained in his possession the \$56 note, excepting that, in the summer of 1843, he went to Wisconsin, and called upon Chickering for payment of the amount due upon it, and, upon Chickering's declining to make payment, left the note with one Stearns for collection, taking Stearns' receipt therefor; that the defendant never called upon the plaintiff for the bills or guaranty; and that the plaintiff, when he was in Wisconsin, in 1843, did not call upon either Chickering, or Newell, upon the guaranty.

The plaintiff claimed to recover,—1, For the amount received by the defendant of Chickering in bills of the Towanda Bank,—being \$535.00,—2, Interest on the same to the time of the audit, which was June 20, 1844, being \$85.46,—3, One half of the discount made by the defendant to Chickering, being \$22.20,—4, The amount of the note taken by the defendant from Chickering, being \$56.00. The county court rendered judgment, upon the report, for the plaintiff for the amount of the three first items and disallowed the claim for the \$56.00 note; to which decision the defendant excepted.

S. Austin and Tracy & Converse for defendant.

To the allowance of the three items, for which the county court rendered judgment in favor of the plaintiff, the defendant objects.

1. Because from the auditor's report, as the facts are found by him, it appears that the defendant was the agent of the plaintiff, in receiving this money of Chickering.

2. As it regards the item of \$535.00, the defendant received

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the bills in good faith, supposing the quality of the money to be as required by his instructions, that is, equal to the bills of the New York Country banks. The plaintiff, then, was bound to receive the same of the defendant, in discharge of and in acceptance of his agency.

3. We contend that the acts of the plaintiff on the 14th of November, 1841, and subsequent thereto, amounted to a ratification of the defendant's agency. The taking and using the note, which is the item disallowed in the plaintiff's specification, was, as the auditor has found, an acceptance in part, as it regards the Chickering demand. And an acceptance in part, or a ratification in part, is a ratification of the whole, as between principal and agent. N. Y. Dig. 766-70. 1 Petersd. 104.

4. The receiving the guaranty of Chickering by the plaintiff was a ratification of the agency of the defendant, as it regards Chickering. If the plaintiff did not design to make the act of the defendant his own, he should have shown his dissent at the time he first had knowledge of the doings of the defendant, and have repudiated them.

There is nothing in the case showing that the plaintiff did not intend to rely upon the guaranty, until the summer of 1843.

5. The plaintiff has never called upon Chickering upon his guaranty, nor given him any notice of the failure of the money received by the defendant. The plaintiff should either have shown his dissent, and returned the guaranty to the defendant forthwith, together with the money, so that the defendant might seek his remedy, if liable at all, against Chickering, the guarantor, or he should have given Chickering notice that he repudiated the act of the defendant, as agent, and that he still held him responsible upon the original contract, as his agent had exceeded his authority.

6. If the defendant is liable at all, he is not liable in this form of action. The plaintiff has alleged that the defendant was the receiver of his moneys, and that he refuses to account, while he attempts to charge him with having exceeded his instructions, and thereby to make him liable for the money, upon the ground that it was such as the plaintiff ordered him not to receive. Were it even so, we think the plaintiff has entirely mistaken his remedy. And the objection to the form of action is well taken upon the report of the auditor.

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7. As it regards the item of discount, the defendant followed his instructions, as he understood them, which, we think, is a sufficient excuse for him.

Parker and Peck for plaintiff.

1. The defendant was a special, paid agent, so constituted by the plaintiff, for a particular purpose, and with a specific and limited authority,—to deliver a deed, take up a bond, to make a certain discount on one half of the debt, for two months, and to receive the balance of the claim in funds as good as gold and silver, or, at worst, in such current bills as were at par here. This was the whole extent of his power. His receiving money, therefore, of less than par value, discounting on the whole debt, instead of half, taking an unauthorized guaranty, and giving up an ample lien on realty, and taking a note, without any security, for a part of the debt were acts clearly beyond his authority and utterly void, and, being so, render the defendant liable to the plaintiff and personally chargeable for all loss, either immediate or consequential. *Dellafeld v. State of Illinois*, 2 Hill 159. *Andrews v. Kneeland*, 6 Cow. 354. *Munn v. Commission Co.*, 15 Johns. 44. *Beals v. Allen*, 18 Johns. 363. *Rossiter v. Rossiter*, 8 Wend. 494. *Armstrong v. Gilchrist*, 2 Johns. Cas. 424. Story on Agency, 18, § 17; 19, § 18; 140, § 126; 199, § 165; 214, § 181; 216, § 183; 225, § 192. Paley on Agency 4, 150. 2 Kent's Com. 617–621, (3d edit.) *Fenn v. Harrison*, 3 T. R. 757. *Huntington v. Wilder*, 6 Vt. 334. *Clark v. Foster*, 8 Vt. 98. *Roberts v. Button*, 14 Vt. 195.

2. The acts of the plaintiff, in receiving a part of the money and taking into his custody the Towanda bills, guaranty and other papers, as found by the auditor, cannot we contend, be legitimately construed into the ratification of the acts of the defendant. Even if the plaintiff had unconditionally accepted the money, he would not have been bound, under the circumstances, by such accounting. It would have been no payment in law; and the plaintiff might, at any time, have returned the papers, or tendered them to the defendant, and demanded other and current funds, or held the defendant responsible in an action. But, by the finding of the auditor, the bills and other papers were taken by the plaintiff only on the condition, that they should prove to be good and available, on inquiry; and

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the auditor farther finds that they were not good, but were almost wholly worthless, and, indeed, in no respect available for any purpose. This, at most, was but a qualified acceptance, by no means a ratification; when the plaintiff ascertained the fact of their worthlessness, he immediately notified the defendant, and called on him for a settlement. "When an agent does an act unauthorized by his orders, the principal is not bound to ratify, or disavow it, as soon as he is apprised of the circumstance; he has a right to de-
"liberate." *Kingston v. Kincoid*, 1 Wash. C. C. Rep. 455. Story on Agency, 288, § 243. 2 Kent 616. *Russell v. Green*, 5 Conn. 269, (2d series.) *Owings v. Williams*, U. S. Cond. R. 527. Story on Agency 514, § 413; 112, § 99. Paley on Agency 220. *Wainwright v. Webster*, 11 Vt. 576. *Gilman v. Peck*, 11 Vt. 516. *Bishop v. Baldwin*, 14 Vt. 145.

The opinion of the court was delivered by

REDFIELD, J. The rules of pleading, in the action of account, were correctly laid down, we think, in the case of *Bishop v. Baldwin*, 14 Vt. 145. If the rule there laid down admits of any farther qualification, than the exception there named, it does not now occur to us. It is there said, that "what may be pleaded in bar must be so pleaded," and that "all defences, which might be pleaded in bar, if not pleaded are considered as waived,"—which are only identical propositions in different terms. It is there determined that the judgment to account establishes all the facts in the declaration, except the defendant's being in arrear. See *Taylor v. Page*, Cro. Car. 116, as fully confirming the rule laid down in *Bishop v. Baldwin*.

This, then, would seem to be the only inquiry in the present case,—Was the defendant in arrear to the plaintiff at the time of the accounting before the auditor? This is, I am aware, almost precisely the same inquiry, which might have been raised, before the court and jury, upon a plea of *plene computavit*, but not precisely the same, perhaps. The defence of *plene computavit* seems to rest upon the ground of an express settlement of the dispute and the surrendering of all the property pertaining to the trust, while that of *nothing in arrear* goes upon the ground that there is nothing *now* in the defendant's hands, which he is liable to account for. This

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may be shown in various modes,—as, for example, that it has been handed over to the plaintiff, or to a third person by his direction, or that it has been destroyed, or has perished without the fault of the defendant, B. N. P. 128. Thomas' Co. Lit. 106, note 19. Co. Lit. 89 a. 2 Ch. Cas. 2. Hargrave's notes to Co. Lit., n. 5, 89 a; (75.)

There seems to be no question in the case, except as to the Towanda money received of Chickering. There is no pretence for charging the defendant with the note of Chickering, taken for the balance of the former note;—for it is as good as the former note, to that amount, and it was accepted by the plaintiff, and was treated as his own up to the time of the trial before the auditor. In regard to the Towanda money, we think the defendant is not in arrear. The obligation of the defendant, in regard to the matter, must be according to the contract, *as he understood it*. He was only bound by the contract according to his own understanding, unless there was fraud, or some fault on his part, in not comprehending the plaintiff's instructions,—which is not shown, and will not be presumed. Perhaps it ought, rather, to be supposed that the plaintiff was deficient, in not fully expressing his meaning. Taking the defendant's obligation in this sense, it seems to us, that he cannot be made liable in this action.

1. If it be conceded that the defendant was guilty of negligence, in taking this money without farther inquiry into its character, it could hardly be considered a case of gross negligence, whereby he would make the money his own, and render himself liable to account for it, as for current bills. For he took the precaution to have Chickering's guaranty, with surety; and when all the facts were made known to the plaintiff, *he* took the money and the guaranty, saying he would see what he could do with it,—which he would not have done, had it been a case of palpable neglect. His conduct satisfies us, that, at the time, he considered that the defendant had done well, and that he had done as the plaintiff would have done himself, or as any prudent man would have done. It was not an easy matter to ascertain the character of Towanda money, perhaps, in Wisconsin. If it were good, he would wish to have it; if not, the guaranty made the claim no worse, at all events, than the note, and probably better. The most that could be claimed in

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the case is, that there was *some* neglect, *some* want of *ordinary care*, which could only subject the defendant, I apprehend, to a special action upon the contract, and not make him liable to account for the money as good money. But there seems to us to be no satisfactory evidence in the case of *any neglect*. If there was neglect, and that is important, it should have been found by the auditor as matter of fact; but we think the auditor reports such facts, as virtually shows that there was *no neglect*.

2. It seems very plain to us, that the plaintiff's taking the money and guaranty, and keeping them for months, fully exonerated the defendant. The plaintiff received of the defendant all that the defendant received of Chickering, and all that belonged to him, under protest, to be sure, that he would see what could be done with the money. How long a time is to be allowed him, to ascertain that fact? It could hardly be pretended that two or three months were necessary to ascertain that fact. It could just as well be done in as many weeks, and very likely in as many days. The credit of a bank can be more easily ascertained in Vermont, and especially in Boston, or New York, than in the wilderness, or the prairies of Wisconsin, where one might almost as well inquire, for such a fact, of an Indian hunter, as of the American land jobber.

3. Suppose the plaintiff's delay to ascertain the character of this money and to notify Chickering has released his guaranty,—could the loss be made to fall upon the defendant? This no one will pretend; which shows that the plaintiff had made the money his own. I do not pretend to say that the delay here will exonerate Chickering, but I put the case to illustrate the effect of the delay. We think it clear that the delay was such as to exonerate the defendant. By a reference to Hill's New York reports, I find that this subject has, to some extent, been under discussion there. (*Thomas v. Todd*, 6 Hill 340.) It is there held that payment in counterfeit bills, or in the bills of a bank which has failed, although this fact is not known to either party, is a nullity, and will not discharge the debt. The same had been decided in this state. *Gilman v. Peck*, 11 Vt. 516. The case of *Thomas v. Todd*, decides, too, as did also that of *Gilman v. Peck* impliedly, that, if the party receiving the bills is guilty of negligence, in not returning them within a reasonable time after he discovered, or might have discovered, their worthlessness, he will

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be obliged to sustain the loss. But the consideration of this point is not important, except as it shows how manifestly the defendant is exonerated from all responsibility. Very likely the obligation of Chickering, upon his guaranty, may be different from the implied obligation resulting from merely giving the bills in payment, without fault.

Judgment reversed, and judgment for defendant, upon the report.



ALFRED H. HENRY v. EDMUND TILSON, JR.

In a case admitting of reasonable doubt as to the amount in dispute exceeding one hundred dollars, and where the plaintiff might have had reasonable ground of expectation of recovering more than that sum, the action will not be dismissed for want of original jurisdiction in the county court.

It is only in those cases where record proof is vouched as proof of a fact happening upon a certain day, that the date becomes descriptive of the record, and a variance consequently fatal. But where, in a collateral action, it is alleged that an arrest and commitment were made upon a certain day, and, on trial, the allegation is attempted to be proved by the return of the officer who made the arrest, and from that it appears that the arrest was made upon a different day, the variance can have no effect upon the plaintiff's right of recovery.

A declaration, in an action brought to recover the penalty given by statute for taking excessive and illegal fees, which specifies all the items of fees charged, and avers that the *excess* of fees therein charged was "a large sum, to wit, the sum of \$4.00," might be bad upon demurrer, for not specifying the items of *illegal* fees taken, but is sufficient after verdict.

The history of the legislation, in the State, in reference to the subject matter of a particular statute, may be referred to, as tending to aid in the construction to be given to the statute.

Where the literal interpretation of a statute would lead to a gross absurdity of restriction, the court will extend its application to cases within the same equity, though at the expense of *forcing* the construction of the words.

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Under sect. 8 of chap. 107 of the Revised Statutes, *all officers*, who perform services for which no fee is specially allowed by statute, are entitled to charge therefor such sum as shall be in proportion to the fees established by law; the right to compensation for such service is not confined to clerks and recording officers merely.

An officer, who receives illegal fees, is liable to the penalty imposed by sect. 16 of chap. 106 of the Revised Statutes, whether such fees are received for services for which a fixed compensation is given by law, or for services not specified in the fee bill, and for which compensation is allowed under sect. 8 of chap. 107 of the Revised Statutes.

But an officer, who receives illegal fees, is not liable to the penalty imposed by sec. 16 of chap. 106 of the Revised Statutes, unless he received such illegal fees *knowingly*. In this respect the sixteenth section must have the same construction with the fourteenth and fifteenth sections.

A constable, who commits a person to jail by virtue of a tax warrant, is only entitled to charge fees for actual travel, one way, in the commitment,—there being no return necessary.

But if the constable receive fees for travel from the place of commitment to the office of the treasurer, to whom he is required to pay the tax, when collected, he is entitled to prove, in an action brought against him to recover the penalty given by statute for receiving illegal fees, that it had been the usual practice of collectors of taxes to charge such fees.

A charge for the conveyance to jail of a prisoner, who is committed upon a tax warrant, or in a case of commitment for debt, is not ordinarily allowable,—that being included in the fee given to the officer for travel.

THIS was an action against the defendant, as constable and collector of the town of Braintree, brought to recover the penalty imposed by the Revised Statutes, chapter 106, section 16, for receiving illegal fees. The declaration was in four counts, in each of which it was averred that the defendant, as collector, held a tax bill,—on which was a tax against the plaintiff,—and a warrant thereto attached, and that, by virtue of the said warrant, the defendant, on the seventh day of May, 1843, arrested the plaintiff, and committed him to jail in Chelsea, in the county of Orange, and deposited with the keeper of the jail a copy of said warrant, on which he minuted his fees, as follows, viz.—Copy \$0.75. Travel, 40 miles, \$2.40. Conveyance \$1.00. Key fee \$0.34. Levying

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¶0.15. And it was avered that the plaintiff, in order to obtain his liberation from jail, was obliged to, and did, pay the amount of fees so minuted which amount was received by the defendant, and that the defendant received greater fees than were allowed to him by law, and that the excess so received by the plaintiff was "a large sum, to wit, the sum of four dollars." The penalties claimed amounted in the whole to \$160.00. Plea, the general issue, and trial by jury.

On trial the plaintiff introduced testimony tending to prove that the defendant, as constable and collector of Braintree, committed the plaintiff to the jail in Orange County on the seventh day of April, 1843, on four tax warrants, and delivered to the jailer copies of the same, with the amount of the taxes against the plaintiff and of the defendant's fees for the commitment minuted thereon, as set forth in the plaintiff's declaration, and that the plaintiff, for the purpose of obtaining his discharge from the jail, paid said amount. It appeared that it was twenty miles from the place where the plaintiff was arrested by the defendant to the jail in Chelsea, and twenty miles from the said jail to the office of the Treasurer of the town of Braintree, and to the office of the Treasurer of the State,—to whom the taxes against the plaintiff, when collected, were to be paid by the plaintiff.

The defendant offered testimony, tending to prove that it had been the usual custom of collectors of taxes in Braintree to charge fees for travel, in such cases, from the place of service to the jail, and from thence to the Treasurer's office;—to the admission of which the plaintiff objected, and it was excluded by the court.

The defendant then moved the court to dismiss the action for want of jurisdiction;—which motion was overruled by the court.

The defendant requested the court to instruct the jury, that the plaintiff could not recover, for the reason that he alleged in his declaration that the arrest was made May 7, 1843, and the evidence showed that it was made April 7, 1843;—that the plaintiff could not recover, unless the jury were convinced that the defendant charged and received the fees, *knowing* them to be illegal;—and that the defendant might legally charge for travel, upon said warrants, from the place of arrest to the jail, and from the jail to the Treasurer's office, where the tax was to be paid, and a reasonable sum for carrying the defendant to jail.

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The court refused to instruct the jury as requested, but did instruct them, that the plaintiff might recover, notwithstanding the proof did not correspond with the declaration in regard to the time of the arrest and commitment;—that, if the defendant charged fees which were illegal, the law will presume that he did it knowingly;—and that, as the law had not provided for charging for conveying the plaintiff to jail, the defendant had no right to charge any fee for that.

The jury returned a verdict for the plaintiff. The defendant then filed a motion in arrest of judgment for the insufficiency of the plaintiff's declaration; which motion was overruled by the court. Exceptions by defendant.

L. B. Vilas and J. P. Kidder for defendant.

1. The defendant ought to have been permitted to prove the custom of officers, in relation to charging fees on warrants for the collection of taxes. The warrant, upon its *face*, is not returnable; but in *fact* it is otherwise; for the officer must make known in some manner how he has disposed of the tax against the delinquent, and the only course for him to take, to exonerate himself from the payment of the tax, is to convey *that* knowledge of the disposition of the tax, or the delinquent, which he has made in the premises, to the proper authority of his town. The officer, in making out his bill of fees, followed the *general* statute,—charged from the place of arrest to the place of return,—the treasurer's office.

2. The plaintiff *well knew* that there were no more than twenty miles travel (if any) charged, that was illegal; also, that there was only one dollar, for conveyance, illegal; and certainly no more than twenty five cents on each copy which was illegal. The principle of law is well settled, that, if the plaintiff brings his action to the county court, without having good reason to believe that he shall recover more than \$100, the county court has not jurisdiction.

3. The proof did not sustain the declaration. A party may, in pleading, make a point material unnecessarily; but, when made, he must abide the consequences. If the plaintiff counts upon a writing obligatory as bearing date on a certain day, and the instrument is dated on a different day, the variance will be fatal. The rule is the same, whenever the time stated in the pleadings on either side is to

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be proved by a record referred to in the pleadings. *McDaniels v. Bucklin*, 13 Vt. 279. Gould's Pl. 91-92 and cases there cited.

4. This is an action for a *penalty*, and a proceeding *criminaliter*. Full proof is required in criminal actions and in actions of a criminal nature. In the same chapter in the Revised Statutes, under which the plaintiff claims that the defendant is liable, sec. 14, it reads. "If any clerk of the county or supreme court, in taxing any bill of costs, shall *knowingly* include a greater sum than is provided for by law," &c.; also, sec. 15, "If any attorney or other person" &c. "shall *knowingly* make up, take and receive a greater sum," &c. We believe the doctrine is, to put a *liberal* construction on statutes; if so, how can we, consistently, make this defendant liable on the mere fact that he *took* illegal fees, when, upon a trial of a *clerk*, or *attorney*, the jury must be convinced he taxed and received the fees *knowing* the same to be illegal?

5. The request made to the court, to charge the jury that the defendant could legally charge travel from the place of arrest to the jail and from thence to the treasurer's office, and a reasonable sum for conveying defendant to jail, is within the spirit and meaning of the statute. Collectors of taxes are allowed to tax and collect like fees, as sheriffs are allowed for levying executions. Rev. St. 476. It has always been the custom for sheriffs to charge fees for conveyance, likened unto the rule to charge for securing property and taking an invoice of goods attached.

6. The declaration is insufficient. It is a settled rule, in actions on statutes, that every circumstance in the description of the offence, contained in the body of the clause that creates it, and gives the penalty, or forfeiture, must be set forth, so as to bring the defendant within the statute. *Ellis v. Hall*, 2 Aik. 41. Among other things, not sufficient in the plaintiff's declaration, is this,—that the excess received by the defendant of the plaintiff is described as a large sum, to wit, the sum of four dollars, &c. He ought to have mentioned *the item* of fees which was greater than provided for by law, so that we could meet it.

E. Weston for plaintiff.

1. The plaintiff contends, that the defendant had no right to charge for travel from the jail to the treasurer's office. The war-

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rants required no return ; the service was completed at the jail, and the collectors should not charge for any except actual travel ;—and other collectors having so done does not make it lawful.

2. The charge for *conveyance* is illegal, not being provided for by law.

3. The law will presume that the illegal fees were taken *knowingly*.

4. There is no *variance* between the declaration and proof, relative to the *time* of the arrest. The time of the arrest is *immaterial*, and has nothing to do with the charging and receiving the illegal fees. The receiving the illegal fees was independant of the arrest, and was proved wholly by parol. It was not necessary to prove the arrest by the copies. The suit is not for arresting and imprisoning the plaintiff. The reciting the warrant and return in the writ is merely *inducement* and perhaps may be treated as *surplusage*. Gould's Pl, 88-91.

The opinion of the court was delivered by

REDFIELD, J. 1. The defendant moved to dismiss the action for want of original jurisdiction in the county court. We think the motion was correctly overruled. From the ultimate decision of this court it will be seen that the plaintiff might have had reasonable ground of expectation of recovering more than one hundred dollars. And we have long since adopted the rule of decision, in regard to conflicting jurisdiction between the county court and justices of the peace, not to turn the party out of the county court, in a case admitting of reasonable doubt as to the amount in dispute exceeding one hundred dollars. *Kittridge v. Rollins*, 12 Vt. 541.

2. We do not think the variance between the date of the return upon the warrant and the time of the arrest and commitment, as alleged in the plaintiff's declaration, is material. The process, not being returnable process, could not properly be vouched as proof of any fact ;—and it is only in those cases where record proof is vouched as proof of a fact happening upon a certain day, that the date becomes descriptive of the record, and a variance consequently fatal. The merely averring that a fact occurred upon a particular day, which *may* be proved by merely oral testimony, but which, on trial, is *in fact* proved by the written admission of the opposite party,

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does not make the date of the admission material. If the declaration had alleged that the return *bore date the seventh day of May*, this would have been descriptive of the return,—but not when it is alleged that the arrest and commitment happened upon that day.

3. The declaration might have been defective, for not specifying the items of illegal fees taken by the defendant, and bad upon demurrer, but not on motion in arrest of judgment. After verdict all reasonable presumptions will be made in favor of the pleadings.

4. The main question in the case is one of importance, and upon which there have been no decisions of this court. The course of the history of legislation upon the subject will best interpret the statute now in force. Two questions seem to naturally arise here.

1. Whether any officer is entitled to demand fees for services performed, but for which there is no fee given in the statute? 2. If so, whether an officer exposes himself to the penalty for taking illegal fees, by taking excessive fees for services not specified in the fee bill; or only for that class of services, where a fixed compensation is given by law?

Upon the first point, we refer to the history of legislation, as tending to elucidate it. There seem to have been fee bills enacted by the legislature almost every year from 1779 to 1783, but nothing from which we can infer whether any other fees, than those specified, were to be allowed to any officer, until the latter year. In 1783 the enacting clause is as follows,—“That the fees to be taken by the several officers in this State, herein after mentioned, *so far as the same are particularly enumerated*, be as follows, viz.” This same form is adopted in the Revision of 1787. From this phraseology we infer that the legislature intended to distinguish between “*enumerated*” and “*non-enumerated*” fees. In the Revision of 1798 the act establishing the fee bill expressly enacts, that a specified number of officers, among whom are sheriffs, which, as to fees, will include constables and collectors, and “all other persons, whose duty it may be to record any proceedings, or give any copies, attestations, or certificates, &c., shall be allowed seven cents for every hundred words, and for every other duty, of service, done, or performed, such sum as shall be in proportion to the fees specifically provided by this, or any other act, for such officers respectively.” This same provision was virtually re-enacted in the

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fee bill of 1831, and in the late Revised Statutes. It has long since received a practical construction, of giving *non-enumerated fees* to *all* persons, who are required, by law, to perform services, for which no fees are specifically fixed.

It is certainly difficult to conjecture any good ground, upon which a *general* allowance should be made to *certain* officers for *all* "duty, or service," where no specific fee is provided, and not extend the same provision to *all* officers. Such, certainly, has always been the practice under this, and similar statutes since; and the *form* of the present statute seems to justify such a construction. It is as follows,—“All officers and persons—whose duty it may be to record any proceedings, or give any copies, other than such for which fees shall be established by law, shall be allowed therefor seven cents for each folio—and for any other services performed, such sum as shall be in proportion to the fees established by law.” I have adopted the *dash*, instead of the *comma*, in punctuation, which shows more clearly how the construction should be, and, indeed, *must* be, to avoid *partiality and absurdity*. For if we regard the provision as merely intended to give a *general compensation* for recording and certifying, the conclusion is wholly unnecessary, and, in *terms the most unequivocal*, extends to *all* “*other services performed*.” Why, then, the question arises, should *clerks* be paid for *all other services*, and not *every other officer, or person*? The question, I apprehend, is unanswerable, unless we conclude the legislature intended to discriminate in favor of recording and certifying officers, not only as to those acts, but all other acts performed,—which is too absurd to be entertained.

We conclude, then, that the present Revised Statutes do provide, that “All officers and persons shall be allowed for all other services, than such for which fees shall be established by law, performed [by them,] such sum as shall be in proportion to the fees established by law.” This was doubtless the object, in enacting the eighth section of the 107th chapter, which has been cited above;—but in regard to *records and copies* not enumerated, they wished to fix the compensation by the folio. In attempting to combine the two objects a form of expression was adopted, that seemed to exclude all other officers, except recording and certifying officers,—but not necessarily excluding them,—and the necessity of the case

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compels us to include them, at the expense of forcing the construction of the words of the act, in order to avoid so gross an absurdity as the literal interpretation would lead us into.

2. If, then, by express provision of the statute, all officers are entitled to compensation for all official services, by them performed, when no fees are established by law, in proportion to those which are established, the question arises, what are illegal fees?—and how are they to be taken? Does the mere act of *taking* subject the person to the penalty? or must it be done *knowingly, male animo*? Here, too, there is some difference in the phraseology used in giving the penalty against different officers, which, if interpreted literally, would lead to a very absurd discrimination in favor of certain classes of persons,—which is the last thing a legislature should be supposed to intend, unless they have very clearly so expressed themselves. “Equality is equity” in legislation, as well as every where else. We shall present the sections referred to. Sect. 14. “If any clerk of the county or supreme court, in taxing any bill of cost, shall knowingly include a greater sum, than is provided for by law, he shall be liable to pay the person aggrieved the sum of ten dollars for each dollar excess of fees, that should be included in such bill of cost, and in the same proportion for a greater or less sum.” Sect. 15. “If any attorney, or other person practising before any court, shall knowingly make up, take, or receive, a greater sum, in any bill of costs, than is provided for by law, he shall pay to the person aggrieved,” &c. Sect. 16. “If any officer, or other person, shall receive any greater fees, than is provided for by law, he shall pay,” &c.

Here seems, in terms, a plain provision, that, if any attorney shall *knowingly* make up, take, or receive, any greater sum, &c., and if any other officer, or person, shall receive, whether knowingly, or not, he shall be subjected to the tenfold penalty. Any man, at all acquainted with the state of public feeling, would least of all look for a discrimination in favor of attorneys in regard to receiving fees; and perhaps no good reason can be conjectured, why they should only be liable on proof of knowledge, and all others should be presumed to have knowledge of the illegality of fees taken by them. The reasonable presumption, perhaps, would be, that those most learned in the law would be less likely to offend ignorantly. The

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truth is, no doubt, that no such discrimination was intended to be made. The present Revised Statute, upon this subject, is almost a literal transcript from the statute of 1821, except that there it is all in one section, and what now forms the sixteenth section is a mere summing up of the general provision, and extending it to *all persons*. This general sweeping clause would be supposed to be, in some sense, qualified and explained by the former part of the same section, when the word "*knowingly*" is twice used as to clerks and attorneys, and is omitted in the general clause merely for the sake of euphony, being, from its juxta position, almost necessarily implied. But when this general clause comes to be made a distinct section, the implication of the word *knowingly* is not so natural and obvious, as when it was all one section.

It has sometimes been attempted to get rid of this apparent absurdity, by resort to another different form in the phraseology of the different sections of the present statute. In the fourteenth and fifteenth sections the expression is, any "*greater sum*,"—in the sixteenth section, any "*greater fees*." The supposition has sometimes been made, that this was intended to be confined to such fees only, as are enumerated in the fee bill. But a recurrence to the history of legislation will here best explain the import of the present statute.

The first statute giving a penalty for taking illegal fees, passed in this state, was in 1802, and was as follows,—extending only to attorneys, sheriffs, deputy sheriffs, bailiffs and constables,—“If any of the persons aforesaid shall knowingly and wilfully demand and receive any more or greater fees, for any services by them, or either of them, performed, than is allowed them by law, or shall demand and receive fees for services not performed, (unless it be for services which he is obliged by law to perform after receiving such fees,) he shall forfeit and pay to the party aggrieved four fold,” &c. This statute continued in force until 1821, when it was extended to all officers and persons, and increasing the penalty to ten fold. No other alteration seems to have been intended to have been made in the law. The difference in the use of terms was doubtless merely accidental at the time, and has been adopted into the present revision.

We conclude, then, that if any officer, or other person, knowingly take any more or greater fees, that is, fees enumerated, or not enumerated, or for services not performed, (and which he is not bound

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to perform, and when there is no substitution of one service for another, done fairly and *bona fide*, and not for the oppression of the person paying such fees,) that such person is liable to the penalty. The proof will be different in different cases, but must usually be a question of fact, to be determined under all the circumstances of the case.

In the present case the officer was clearly not entitled to pay for travel, except actual travel one way in the commitment, there being no return necessary;—but such a practice might have led him to conclude he was. The charge for “conveyance” is not, under ordinary circumstances, allowable; for if a man is able to endure a confinement, he is usually able to travel on foot, in order to reach the place of confinement; and the officer may walk with him, if he choose; or he may ride, and carry his prisoner at the same fee. This is an item of fees of modern invention,—at least in common cases of commitment for debt. The price of the copies may be determined by the number of words.

Judgment reversed, and new trial.



WYLLIS LYMAN AND ELIAS LYMAN, administrators of ELIAS LYMAN, v. WILLIAM WEBBER, JR.

An administrator, who is out of possession, of real estate, whether disseized, or having surrendered the possession to the heir, can neither maintain trespass, nor an action on the case, in behalf of the heir, for an act which is a damage to the inheritance.

IN THIS CASE the plaintiffs declared against the defendant in a plea of the case, alleging that they were possessed, as administrators, of certain premises, which were the property of the intestate, in his lifetime, and of which he died seized, upon which there were lying a quantity of felled trees, timber, cord wood and brush, which had been cut and partly prepared for removal for the purpose of clearing and cultivating the land, and that the defendant set fire to the said felled trees, timber, cord wood and brush, knowing

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that the same were not prepared and dried, so as to be in a proper condition for burning, whereby the land was improperly and badly burned over, and greatly injured, &c. Plea, the general issue, and trial by jury.

On trial it was conceded that Elias Lyman died intestate in 1834, he then being seized in fee of the premises described in the declaration and that the plaintiffs were, and continued to be, to the time of trial, the administrators upon his estate. It appeared in evidence that the plaintiffs, for several years after the decease of the intestate, leased the said premises to different individuals, and that, in 1841, one Joseph F. Tilden, whose wife was a daughter of the intestate and still living, entered into possession of the premises, and continued in possession thereof to the time of trial, managing the same; but there was no evidence as to the terms, or agreement, or under whom, he went into possession. It farther appeared, that, in the spring of 1843, one French, who was employed by Tilden, cut over about five acres of the land, being wood land, for the purpose of clearing the same, and that in May, 1843, the defendant, in his own wrong, set fire to the wood, brush, &c., lying upon the land, at an improper time for burning the same, by reason of which it became more expensive to clear the land, and the land itself became less valuable to the occupier, than it would have been, if the wood, brush, &c., had been well burned, which might have been done afterwards, and showing a probable damage to the crops, which might have been put upon the land,—though it did not appear from the evidence that any had been sowed.

The defendant contended, that upon these facts, this action could not be sustained; but the court, *pro forma*, directed the jury to return a verdict for the plaintiff, assessing such damages as they should find had resulted from the wrongful act of the defendant. To this direction the defendant excepted.

——— for defendant.

Tilden and his wife were in possession of the premises at the time the injury complained of was committed, and had been for some years, apparently in the right of the wife, as one of the heirs of the intestate. Consequently, the action should have been brought in their names.

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But if the administrators can recover at all, under the circumstances, the action should have been trespass,—the act complained of having been forcible, and the injury, resulting therefrom, immediate, and not consequential. 3 Bl. Com. 206-9. 1 Chit. Pl. 126-132. 2 Stephen's N. P. 1003-4. 3 Ib. 2629. 5 Taunt. 649. 8 Ib. 190, 191.

If the facts show a case of landlord and tenant, case will lie, in the name of the landlord, only for an injury to the reversion. If the injury is to the tenancy, trespass, in the name and right of the tenant, is the remedy. The latter, if any, is this case.

If the injury was of a permanent nature, the remedy would be case, and should be sought in the name and right of the heir, and not of the administrator. 3 Cow. 299. 5 Cow. 501. 16 Mass. 280.

J. Berry & L. B. Peck for plaintiffs.

Under our statute, on the death of the intestate, the title to the land vested in the heirs, and not in his personal representatives. The only claim, the plaintiffs have to the real estate, is a *lien* for the payment of debts. They are authorized, however, to bring actions for the recovery of damages for all injuries to the real and personal estate; and the only question is, whether the plaintiffs remedy, for the injury complained of, is in *case*. The declaration does not count upon an entry on the premises, but complains that the defendant, by setting fire to the fallen trees at an improper time, rendered it more difficult to clear the land. This injury is clearly consequential. As a consequence of this unlawful act, certain cordwood was also burned up. If A. should set fire to B's buildings, and the fire should extend to and destroy the buildings of C., might not the latter sustain *case*? Would not this be the appropriate remedy? So in this case, the fire set to the felled trees extended to and destroyed the wood and timber. This was a consequence of the act. But if *trespass* is the appropriate remedy for a part of the injury complained of, and *case* for the remainder, why may not this action be supported. *Knott v. Digges*, 6 Har. & Johns. 230, is a direct authority in favor of this action.

Will it not be presumed, after verdict, that the damages were given for the consequential injury only? and that the jury were so

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instructed by the court? If the declaration alleged that the defendant entered upon the premises, the case would have assumed a different aspect. But it does not appear that he ever did so, and it is not to be presumed that he did, as he might have communicated the fire to the felled trees, brush, &c., without an entry. Was there any trespass, then, on the freehold?

The opinion of the court was delivered by

BENNETT, J. The object of this action is to recover damages, which, it is claimed, the plaintiffs, in their representative capacity, have sustained by reason of the defendant; having wrongfully set fire to a quantity of timber, brush, &c., which had been cut upon certain premises, of which, it is alleged, the plaintiffs, as administrators of the intestate, were seized and possessed. The declaration seems to be partly in trespass, and partly in case; but it is not essential, that we should decide to which class of actions it is to be referred, since, in either point of view, the facts detailed in this bill of exceptions will not sustain the action.

It seems that the intestate died seized of the premises described in the declaration, and was the owner thereof, and that the plaintiffs, as his administrators, having taken control of them, leased them to divers individuals for a period of six or seven years, and that, in 1841, one Tilden, who had married the intestate's daughter, who was still living, went into possession of the premises, and has ever since remained in possession, apparently carrying them on for himself. The case, however, is silent as to the circumstances of Tilden's going into possession, and also as to the person under whom he went into possession. We must, consequently, consider Tilden in possession, either as a disseizor, or else as matter of right. If we could presume a *surrender*, by the administrators, of their then present possession of the premises to Tilden, in behalf of his wife who was one of the heirs at law, still this would not help the case. In either event the administrators could not maintain an action of trespass, not having any possession; and though an action on the case may be maintained by a person, who has a reversionary interest, for an injury done to real estate, which works a damage to him in reversion, yet the present is not such an action. The action is brought by the plaintiffs, upon the title of their intestate, and

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they neither declare for, nor claim, any damage in behalf of any reversionary interest.

We think it is quite clear, that an administrator, who is out of possession cannot maintain an action on the case, in behalf of the heir, for an act, which is a damage to his inheritance. If it appeared, that the whole estate was wanted for the payment of the debts of the intestate, and an injury was done to it, while the administrators were out of possession, and the action was brought for the benefit of creditors, it might possibly merit a different consideration. But that is not this case. The result is, that, whatever view we take of this case, the proof cannot sustain this action, and the judgment of the county court is reversed.



TOWN OF TUNBRIDGE v. TOWN OF NORWICH, Appellants.

All that is required, in order to charge a legal settlement by seven years' residence, is, that the person should have his permanent domicile in the second town for seven consecutive years, being *an juris*, and that neither he, nor his family, if he have one, should become chargeable to either town.

But it is not necessary that he should have a family, or, if he have one, that they should be maintained by him, or reside with him, provided, they do not become a public charge. In this case the pauper's wife and family resided in another state, during the whole of the seven years, and it was held that the change of residence was not thereby affected, and that the new settlement gained by the husband became the place of the wife's legal settlement, although the husband had deserted her, in such other state, more than twenty years prior to the making of the order of removal, and they had never, from that time, lived together as husband and wife.

APPEAL from an order of removal of John Broughton and his wife. The case was tried by the court upon the following statement of facts, agreed to by the parties.

About the year 1796 the said John Broughton, and his wife Hannah Broughton, moved from the State of Connecticut into the town of Tunbridge, and resided there until the year 1817, during which time they had several children. In the year

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1817 the said Broughton moved with his wife and family into the State of New York; and in the year 1820 he left his wife and family in New York and came to the town of Norwich, where he resided, and supported himself, until the year 1832, when he married another woman, and moved with her to Barnard, in this state, where he resided with her for about six years and six months, when she died, and the said Broughton went to Tunbridge, to reside with his son, Humphrey Broughton,—which was in May, 1839. About the year 1833 the said Humphrey Broughton, who then resided in Norwich, went to New York and brought home his mother, the said Hannah Broughton, and she resided with him until the year 1839, when he removed to Tunbridge, and took the said Hannah with him. From May, 1839, the said John Broughton and Hannah Broughton continued to reside with the said Humphrey until December, 1841, when they were removed to Norwich by virtue of the order of removal made in this case. While they resided with the son, they did not cohabit or live together as husband and wife, nor have they ever so lived, since the said John left his wife and family in New York in 1820.

Upon these facts the county court decided that both the paupers were duly removed; to which decision the defendants excepted.

L. B. Vilas for defendants.

From the facts agreed upon it appears that the pauper Hannah Broughton has not been treated as the wife of John Broughton since 1820, and that she has not lived with him as his wife since that time. Hence we insist that her residence cannot be controlled by his, and that she could, during this time, acquire a settlement by her own residence. There is no pretence that she acquired a settlement in Norwich in her own right. *Bethel v. Tunbridge*, 13 Vt. 445. But if the court should hold that they were to be regarded as a family, then it follows that the residence of John Broughton, in Norwich, while his wife was in the state of New York, previous to 1833, would not create a settlement in Norwich, and therefore that neither of the paupers had a settlement in Norwich. In the one event the court would hold that the woman was unduly removed, and in the other, that both the woman and the man had no settlement in Norwich.

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G. Relfe for plaintiffs.

1. The plaintiffs insist, that, from the facts in this case, it is evident, that John Broughton's legal settlement is in Norwich. Slade's Stat. 381-383. *Middletown v. Poulney*, 2 Vt. 437. *Burkington v. Calais*, 1 Vt. 385. *Georgia v. Grand Isle*, 1 Vt. 464. *Adm'rs of Chafin v. Wardens*, 15 Vt. 560. *Starksboro' v. Hineburgh*, 13 Vt. 215. Brayton 185.

2. Hannah Broughton, being *de lege* the wife of John Broughton, has her legal settlement also in Norwich. This is so notwithstanding their separation, and would be so, were there a divorce *a vinculo*. Slade's Stat. 381. 1 Bl. Com. 363. *Wells v. Westhaven*, 5 Vt. 322. *Rez v. Eltham*, 5 East 113. *Eastwoodhey v. Westwoodkey*, 1 Str. 438. *Barnet v. Concord*, 4 Vt. 564. *Brookfield v. Hartland*, 10 Vt. 424. *Bradford v. Lunenburg*, 5 Vt. 481. *Georgia v. Grand Isle*, 1 Vt. 464. *Bethel v. Tunbridge*, 13 Vt. 445. *Townsend v. Billerica*, 10 Mass. 411. *Canton v. Bentley*, 11 Mass. 441. *Middlebury v. Waltham*, 6 Vt. 200. *Hanover v. Weare*, 2 N. H. Rep. 131. *Landaff v. Atkinson*, 8 N. H. Rep. 532. *Royalton v. West Fairlee*, 11 Vt. 438. *Dalton v. Bernards-town*, 9 Mass. 201. *Guilford v. Oxford*, 9 Conn. 321. *Hartland v. Pomfret*, 11 Vt. 440.

The opinion of the court was delivered by

REDFIELD, J. The only question in the present case is, I apprehend, whether John Broughton, the husband, was duly removed. For if that is true of the husband, it follows, of necessity, in regard to the wife,—there being no law, by which she can have a settlement in any other town, than that of her husband's settlement, if he has a legal settlement within the state.

There can be no good ground to doubt, from the case, that John Broughton had a legal settlement in Tunbridge in the year 1817, when he left for the state of New York. For, having resided in Tunbridge from 1798 until that time, when, both by the statute of 1797 and that of 1801, one year's residence would give a legal settlement, we are not to presume that this long residence was rendered inoperative, for the purposes of gaining a settlement, by some impediment, like constraint, or subjection, or imprisonment, or wardship.

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As the pauper's residence out of the state is not to be taken into the account, the only remaining question is, whether the seven year's residence in Norwich, and maintaining *himself*, his wife being abandoned in the state of New York, is such a residence as would change his legal settlement to that town. This residence, it will be noticed, is from 1820 to 1832, more than seven years after the repeal of the proviso to the act of 1817, in the year 1823. That seven years' residence in another town should have the effect to change his legal settlement, it is required that he should reside there and "maintain himself and family, and not become chargeable to either of said towns."

It is not to be inferred from the expression "and family" in the statute, that a man, in order to change his settlement under this provision of the statute, must have a family, or that he must necessarily have maintained himself and family, or himself, if he have no family, independant of all aid from any source whatever, besides his own personal labor and services. This would be an unreasonable, not to say an absurd, construction. But the meaning of the statute, undoubtedly, is, that he shall maintain himself, or himself and family, if he have one, *so that neither shall become chargeable to any town for support*. But if the man, or his family, should receive presents, or if either should inherit property, or if his family should maintain him, instead of his maintaining the family, as is sometimes the case, it would not prevent the change of settlement. All that is necessary is, that he should have his permanent domicil, for seven consecutive years, in the second town, and keep himself and family from becoming chargeable to either town. If some of his family are with friends, visiting, or boarding, or if some of them abandon him, or are abandoned by him, but still do not become a public charge, it will not prevent the operation of the residence to change the settlement.

Judgment affirmed.

Spear v. Flint.

SAMUEL SPEAR v. LEWIS N. FLINT.

Audita querela will not lie, to affect a judgment rendered by a justice of the peace, when the matter of the complaint would be proper subject for a writ of error; and it makes no difference that the right to bring a writ of error, in such case, has been taken away by statute.

Therefore, where the defendant, in an action before a justice of the peace, has due notice of the pendency of the suit, and appears, and is denied, by the justice, the right of a trial by jury, he can have no remedy, by writ of *audita querela*, against the plaintiff.

The case of *Tyler v. Lathrop*, 5 Vt. 170, extending the remedy by *audita querela* to a case, in which the right of appeal, to which the party was clearly entitled, was denied, has been held an authority in cases *precisely identical*, but not in cases similar only by a supposed analogy of reasoning.

AUDITA QUERELA. The plaintiff alleged, in substance, that he had been amerced by the plaintiff in a fine for the non-performance of military duty, under the statute of 1842 in reference to the militia, and had been summoned to appear before a justice of the peace, to show cause why judgment for the fine and costs should not be rendered against him, and that he appeared at the time and place designated and demanded a trial by jury, and that the justice refused to allow him a trial by jury, but rendered judgment against him for the fine and costs. The defendant demurred to the complaint.

The county court adjudged the complaint insufficient; to which decision the plaintiff excepted.

J. P. Kidder for defendant.

1. The writ of *audita querela* lies in those cases, only, where the party has not had his day in court,—that is, where he has not had notice, so that he could appear, or has been prevented from attending by the fraud of the opposite party; *Barrett v. Vaughn*, 6 Vt. 243; *Dodge v. Hubbell*, 1 Vt. 491; 1 Sw. Dig. 789; and the complainant must set forth, in his writ, some illegal or fraudulent

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act of the party, or it will be adjudged insufficient. *Sutton et al v. Tyrrell*, 10 Vt. 87. *Little v. Cook*, 1 Aik. 363.

2. In this case the magistrate did not err, in refusing to the delinquent a trial by jury.*

L. B. Peck for plaintiff.

The only remedy for the plaintiff is the one adopted. If he cannot obtain redress in this mode, he is without relief. The adjudications of this court, in analogous cases, seem to apply with great force to the case at bar. *Tyler v. Lathrop*, 5 Vt. 170.

The opinion of the court was delivered by

BENNETT J. We do not think the plaintiff can succeed with this action. The only ground of the plaintiff's complaint is, that he was wrongfully denied, in the justice's court, a trial by jury. It is of no importance, in this case, to inquire whether he had a right to a jury trial, or not, since it is quite clear, that, if such right existed under the statute, the denial of it would constitute no good ground for this proceeding. It would at most, be but error in the proceedings of the justice. The complainant had his day in court, and his ground of grievance is, that he had his trial by the court, and not by a jury, as he claims was his right. The fact that our legislature have not allowed a justice's judgment to be reversed upon a writ of error is no reason, why their errors should be corrected upon *audita querela*.

This case is not like the case of *Tyler v. Lathrop*, 5 Vt. 170. In that case the justice denied to the defendant an appeal, in a case in which he was entitled to one. Though, in that case the *audita querela* was sustained, in conformity to a practice, as it was said, which had obtained, to allow such a remedy; and though that case has been since followed, in cases *precisely identical*, yet we are not disposed to extend it, by a supposed analogy of reasoning, so as to make it an authority for other cases.

The judgment of the county court is affirmed.

*This point was argued at length by the counsel for both parties; but, as it was left undecided by the court, the arguments need not be detailed.

Morse v. Crawford.

AARON MORSE v. ARCHIBALD CRAWFORD.

If property be bailed for a specified time, and, before the term expires, the bailee destroy the property, the bailor may sustain trover against him for its value.

That the defendant, in an action for a *trover*, was insane, at the time of committing the injury, is no defence to the action; and, if the action be for destroying property entrusted to the defendant, it is no defence that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane.

A witness, not a professional man, may give his *opinion* in evidence, in connection with the facts upon which his opinion is founded, and as derived from them; though, *Per BENNETT, J.*, he could not be allowed to give his opinion, founded upon facts proved by other witnesses.

When it appears from the whole case, as stated in the bill of exceptions, that the plaintiff is entitled to recover, the case will not be remanded, for a new trial, though evidence, offered by the defendant in the court below, may have been rejected improperly under the view there taken of the case by the parties and the court.

TROVER for one ox. Plea, the general issue, and trial by the jury.

On trial it was conceded by the defendant, that, previous to May, 1844, the plaintiff delivered to the defendant a pair of oxen, to be kept by the defendant and worked sufficient to pay for their keeping, and that, on or about the tenth day of May, 1844, the defendant killed one of the oxen, while at work with them, by putting a cord around his neck and strangling him.

The defendant's counsel then introduced testimony, tending to prove that the defendant, about thirty years ago, was insane, and that he had been insane at intervals, ever since, and that he was insane at the time the oxen were delivered to him by the plaintiff, and also at the time he killed the ox, and that this was known to the plaintiff. The defendant's counsel then proposed to inquire of the witnesses, who were acquainted with the defendant and had conversed with him, their opinion as to his insanity; to this the plaintiff objected, for the reason that the witnesses were not professional men, and had no skill in such matters, and the testimony was excluded by the court.

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The defendant's counsel requested the court to charge the jury, that, if they found that the defendant was insane generally, and that the plaintiff suffered the oxen to go into his possession voluntarily, knowing that he was insane, and that he killed the ox as the testimony tended to show, the plaintiff was not entitled to recover;— and that, if they found that the defendant had been insane at intervals for the last thirty years, and had lucid intervals, the burden of proof was upon the plaintiff, to show that the defendant killed the ox in a lucid interval.

The court instructed the jury, that, if the plaintiff delivered the oxen to the defendant when he was insane, and this known to the plaintiff, and that the defendant was insane at the time he killed the ox, the plaintiff was not entitled to recover, but that the burden of proof was upon the defendant, to show, that, at the time of killing the ox, he was insane.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

A. Underwood for defendant.

1. The defendant insists that the Court erred, in excluding the witnesses from giving their opinion as to the insanity of the defendant. Though, as a general rule, professional men and men of skill in particular matters, only, can express an opinion, yet in cases of insanity the rule is different. *Lester v. Pittsford*, 7 Vt. 158. *Clark v. State*, 12 Ohio Rep. 483, cited in 7 Law Reporter, No. 7, Title *Insanity*. 3 Stark. Ev. 1707, note 2, and cases cited.

2. The court erred, we insist, in instructing the jury, that they must find the defendant insane, at the time the oxen went into his hands and that the plaintiff knew it. It could make no difference, that the plaintiff might have bailed the cattle to the defendant in a *lucid interval*. If he knew the defendant was subject to fits of insanity, the plaintiff could be considered none the less rash, heedless and fool hardy, from the fact that he selected a *lucid interval*, wherein to put his property into the hands of defendant.

3. The burden of proof, we insist, is upon the plaintiff to show that defendant was sane, at the time of doing the act which caused the death of the ox. "*Semel furibundus, Semper furibundus praesumitur.*" 3 Stark. Ev. 1702-3; *Att'y General v. Parnter*, cited in note to *Ib.*

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Farr and Leslie for plaintiff.

1. Insanity is no defence to an action of this kind; for, if proved, it only goes to the intention with which the act is done, or to show that it was done without any intent in law. But in this action the intention is immaterial. The defendant would be equally liable, if he killed the ox by mistake, or without designing so to do, as by accident. 1 Chit. Pl. 65. 5 Bac. Abr. Tit. *Trespass* G. 184. 4 Bl. Com. 25, note 5. 3 Bac. Abr. 86. 2 Saund. Pl. & Ev. 650. 14 Mass. 207. Ray's Med. Jur. of Insanity, 237-8. 1 Sw. Dig. 531. Brown on Actions at Law 218.

2. The witnesses, whose opinions were asked, were not professional or scientific men, and they were not asked to give, in connection with their opinion, the facts on which it was founded,—without which it is inadmissible. 7 Vt. 161. 1 Conn. 9. 1 Sw. Dig. 749. 9 Mass. 225. 3 Stark. Ev. 1707, note.

3. There was no testimony, tending to show general insanity, in the case; of course the defendant was not entitled to the charge by the court, as requested, in relation to that matter. It is not the duty of the court, to instruct the jury, upon points that do not arise in the case, and which have no connection with it.

4. If the defendant was insane by turns and had lucid intervals, as the testimony tended to show, the burden of proof, to show the state of the defendant's mind when the act was done, rests on the defendant. The presumption is in favor of sanity. 3 Bac. Abr. 89. 1 Russell on Crimes 7. . Ib, 17, note.

5. That the plaintiff bailed the ox to the defendant, knowing him to be insane, can make no difference, if true; no contract was made about killing the ox, nor would any action on contract be the proper action in this case.

The opinion of the court was delivered by

BENNETT, J. No question was made on the trial in regard to the ownership of the ox, or as to the fact, that he was killed by the defendant. The oxen, it seems, were bailed by the plaintiff to the defendant, to be used by him to pay for their keeping, and it appears, that while the defendant had them in his possession under this contract, he destroyed one of them by strangling him.

The defence was put upon the ground that the defendant was in-

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sane, both at the time of the bailment, and also at the time he killed the ox, and that the plaintiff knew of his insanity, when he bailed him the oxen. Can such a defence avail the defendant?

It is a common principle, that a *lunatic* is liable for any *tort*, which he may commit, though he is not punishable *criminally*. When one receives an injury from the act of another, this is a trespass, though done by mistake, or without design. Consequently, no reason can be assigned, why a lunatic should not be held liable. The fact, that the plaintiff might have known that the defendant was insane, when he let him have the oxen, cannot toll his right of action. To give to it that effect, it would be necessary to infer from it the plaintiff's assent to the trespass. Though this might evince a want of prudence in the plaintiff, in entrusting his oxen in such hands. Yet it is no evidence, tending to prove his assent to their destruction. It is possible, that, if the evidence had shown that the plaintiff had bailed the oxen to an insane man, under an expectation that he might destroy them, so as to charge himself in trespass for their value, the rule might have been different. There might have been some little plausibility in claiming that this was equivalent to an assent, on the part of the plaintiff, to the trespass.

The bill of exceptions states, that the defendant's counsel proposed to ask the witnesses, who were acquainted with the defendant and had conversed with him, their opinion as to his insanity; which the court overruled. The counsel on both sides seem to consider the question, on this bill of exceptions, to be, whether the opinion of a witness, (who is not a professional man,) as devoid from personal observation of the defendant can be given in evidence, touching his insanity. The law is well settled, and especially in this state, that a witness may give his opinion in evidence, in connection with the facts upon which it is founded, and as derived from them; though he could not be allowed to give his opinion founded upon facts proved by other witnesses. If we are to understand the bill of exceptions as the parties seem to understand it, we think the evidence would have been improperly rejected, in a case in which the insanity of the defendant was properly in issue. But in this case the plea of insanity, if made out on the trial, could not have availed the defendant; and of course there was no error in the rejection of this testimony, which can avail the party. In this view

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of the case the question, upon whom the burden of proof was cast, as to the defendant's sanity, at the time when the oxen were bailed; and also when the ox was killed, became of no account.

No sound objection can be urged against this form of action, as arising from the contract of bailment. It must, at all events, have been determined by the tortious act of the defendant.

As it appears from the whole case that the plaintiff is entitled to judgment, the judgment of the county court is affirmed.



JARED WELLS v. TIMOTHY L. MACE and CHARLES HALE, SAMUEL HUTCHINS, LEONARD GALE, ELIJAH FARR AND TIMOTHY SHEDD, Trustees.

Where a surety executed, with his principal, a note payable in one year after its date, and, after the note became due, the principal obtained his discharge in bankruptcy, under the Act of Congress of Aug. 19, 1841, and the surety did not prove his contingent claim against the principal under the commission, under sect. 5 of the bankrupt Act, and, after the principal had obtained his discharge, the surety paid the note, it was held the discharge in bankruptcy was no bar to an action in favor of the surety against the principal, to recover the money so paid.

In such action, the declaration being for money paid by the plaintiff for the defendant *at his request*, the moral obligation of the defendant to indemnify his surety is sufficient foundation for *implying*, in law, the *request* alleged.

Where several trustees, summoned under the trustee statute, disclose a *joint* indebtedness to the principal debtor, and one of the trustees claims that the principal debtor, is indebted to himself and a third person, as partners, such individual trustee will not be allowed to set off this claim against the joint indebtedness of himself and his co-trustees.

INDEBITATUS ASSUMPSIT, for money paid, laid out and expended by the plaintiff for the defendant at the defendant's request. A case stated was submitted to the court, setting forth the following facts.

On the ninth day of July, 1840, the plaintiff, as surety for the defendant, and at his request, signed with the plaintiff a note for \$35,00 payable to Hiram Tracy, or order, in four months from

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date, which note the plaintiff paid on the 19th day of July, 1841. On the 14th day of August, 1840, the plaintiff and defendant executed a note, thereby jointly and severally promising to pay to Hutchins & Buchanan, or order, \$157.48 in one year, with interest annually. Upon this note, also, as between the plaintiff and defendant the plaintiff was a mere surety for the defendant. The amount due upon this note, being \$194.11 was paid by the plaintiff to the holders of the note on the 6th day of March, 1844. After the execution of both these notes, and after the first note had been paid by the plaintiff, but before he had paid the second note, the defendant duly obtained a discharge in bankruptcy, under the Act of Congress of August 19, 1841; this, discharge was dated March 22, 1843.

Upon these facts the county court rendered judgment for the plaintiff, for the amount paid by him upon the second note, and interest; to which decision the defendant excepted.

The trustees made a joint disclosure,—from which it appeared that they were jointly indebted to the principal debtor in about the sum of ninety dollars; and one of the trustees, Samuel Hutchins, disclosed that the principal debtor was indebted to the firm of Hutchins & Buchanan, of which firm the trustee, Hutchins, was a partner, in about the sum of \$130, which he claimed should be offset against the indebtedness disclosed by the trustees jointly. But the county court rendered judgment against the trustees for the amount disclosed by them; to which decision the trustees excepted.

A. Underwood for defendant and trustees.

1. This suit is brought to recover for money paid by the plaintiff for the defendant *at his request*, and *proof of the request* is an essential requisite to a recovery. There is no pretence of any *express* request in the case. Had the money been paid for the *benefit* of the defendant, the court might *infer* a request. But how can the court *infer* a request to the plaintiff to pay what the defendant was under *no obligation* to pay? and a debt from which he had previously obtained a complete discharge? As well might the court, had Mace successfully defended a suit on the note by Hutchins & Buchanan, and the plaintiff had afterwards paid it, infer a request by the defendant to pay.

2. The court are bound to give that effect to the discharge in

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bankruptcy, which congress intended it should have. The express provision in the Act, that *sureties shall not be discharged*, and that the bankrupt *shall be*, can be reconciled on no other ground than that the bankrupt should be *relieved from any demand* against him on account of the debt. But, should the doctrine contended for by the plaintiff be sustained, the law is suicidal in this particular. It discharges the bankrupt *from the debt*, and yet he is held to pay it. Had this been the meaning of congress, why not have made a debt with surety an exception to the operation and effect of the discharge? *Exparte Reed*, decided in the Dist. Ct. of Vt., Oct. T. 1844.

But it is said, the plaintiff's claim was not proveable under the commission in bankruptcy and that therefore the plaintiff should recover. But this by no means follows. If congress intended to hold the surety and discharge the bankrupt, the fact that the plaintiff could not prove his claim under the commission could make no difference. But it is the fault of the surety that he does not make his claim proveable. He is bound to pay, and may pay and prove his claim. But the plaintiff's claim *was proveable* by express provision. Sect. 5 provides that *sureties, bail, endorsers* and all others, having *contingent claims, may prove, &c.*

3. The trustees should have been discharged. If held they are jointly held. One is a creditor of Mace. Why should he be charged and compelled to pay the plaintiff's debt, while he is a creditor of Mace equally meritorious? Equity should require that he should hold the amount, for his own debt. *Stone v. Dean*, 5 N. H. Rep. 502.

Parker for plaintiff.

If the certificate is a bar to the plaintiff's claim, it is owing to some peculiar provisions of the Bankrupt act,—some new provision, unknown to any former system. Under the provisions of the law of 1800, it is well settled this claim could not be proved. *Selfridge v. Gill*, 4 Mass. 96. *Barclay v. Carson*, 2 Hayw. 244. 6 Johns. Ch. Rep. 266, cited 1 Metc. & Perk. Dig. 396, no. 18. The same doctrine is fully settled by many cases in England. *Taylor v. Mills et al.*, 2 Cowp. 525. (271.) *Paul v. Jones*, 1 T. R. 599. *Utterson v. Vernon*, 4 T. R. 570. *Swaith v. Gale*, 7 T. R. 364. *Staines v. Planck*, 8 T. R. 375. We insist, that, in order that this

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claim should have been proveable, it must have been such a demand, as Wells could have sustained an action for, or such as he might have proved against a deceased person's estate.

Now we do not question that Hutchins & Buchanan might have proved this debt against Mace; but, if that were so, could Wells also prove, and thus, between them, procure a double dividend, to the prejudice and in fraud of other creditors? *Jones v. Cooper*, 2 Aik. 54. 1 Sw. Dig. 412, § 4. 1 Wheaton's Selw. 76, and note (2.) Brown on actions 509. Metc. & Perk. Dig. 283, no. 357. This was not a *debt* proveable under the commission by Wells. Neither was it a "contingent or uncertain demand," which Wells might have proved; for he had no *demand* at all, either at the time Mace filed his petition, or when he obtained his discharge. So it seems to us that within none of the provisions of the act could Wells have proved his claim, debt or demand, for he had none.

As to the matter of the trustee process, we insist, that, in order to allow the offset claimed, there must be mutuality, which does not exist in this case.

The opinion of the court was delivered by

HEBARD, J. The plaintiff, as surety, on the 14th of August, 1840, signed a note with the defendant for \$157.48, payable to Hutchins & Buchanan in one year, with interest. The defendant obtained his discharge and certificate in bankruptcy on the 22d day of March, 1843; and this note was paid by the plaintiff on the 6th day of March, 1844. The question is, whether the defendant is liable to the plaintiff for the money thus paid out after the discharge in bankruptcy.

The general rule and principle of law, in relation to this matter, is, that all debts, proveable under the commission, are barred by the discharge. The words of the statute are, that "Such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all *debts, contracts*, and other *engagements*, of such bankrupt, which are proveable under this Act." The plaintiff in this suit had no right of action, and nothing proveable under *that* provision of the statute. The plaintiff was but a surety for the defendant; at the time of obtaining the cer-

tificate he had paid nothing ; and consequently he could not maintain any action against the defendant at that time.

But the fifth section of the Act is relied upon by the defendant. This section provides for the proving of several classes of contingent claims and annuities, and among the rest is that of *surety*,—which is *this case*. The expression is, that such claimants “*shall be permitted to come in and prove such debts, or claims, under this Act.*” This section of the statute, as distinguished from the rest, has been subjected to some severity of remark,—but I think undeservedly. By examining this section in all its *parts* and *provisions*, I think it is obvious that the ‘intention was to *enlarge the remedy* of a *surety*, or bail, and not to restrain it. It provides, that the bail, or surety, shall be *permitted* to prove his claim,—not that he shall be compelled to do it ; leaving it optional with him to prove his claim and take his share of the bankrupt’s effects with the other *creditors*, or to postpone his claim, until it becomes absolute by his being compelled to pay, and then taking his chance of collecting it of the bankrupt, after he has parted with all his property.

And this view is the more obvious, from the farther provision of that section,—which is this ; “And no creditor, or other person, coming in and proving his debt, or other claim, shall be allowed to maintain any suit at law, or in equity, therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt.” The correlative of this would be, that, if he did not come in and prove his claim, he would be entitled to his suit against the bankrupt, when his cause of action has become mature. The expression is, that “*he shall be deemed to have waived all right of action.*” If no right of action remained to him, he had none to waive. Therefore, as the plaintiff did not prove his contingent claim under the provisions of that section, he has *not waived* his right of action, and, having paid the note, he may now have his action against the bankrupt, for the money thus paid for him.

The moral obligation to pay the debt still rests upon the bankrupt, and he is under an *honorary* as well as moral *obligation* to save his bail ; and this we think sufficient to meet the objection, that there is no request to pay proved. The plaintiff is *legally* bound to pay that which the defendant is *morally* bound to pay ; and we think under this state of the case the law will imply the request. The judgment against the principal debtor is affirmed.

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There is a question in relation to the trustees in this case. The trustees were acting in an associated capacity; in that capacity they had become indebted to the defendant. We cannot see how one of these individuals can make the application of that fund to the *liquidation* of his private debt, without the aid of a court of chancery; and it is even doubtful whether it could there be done.

The judgment is affirmed.

*FARMERS & MECHANICS v. JOSEPH FLINT, JR.*

The moral obligation resting upon a bankrupt to pay his debts, which were contracted prior to his discharge in bankruptcy, is a sufficient consideration for a new promise, after the discharge, to pay such debt.

Such new promise may be proved by parol evidence.

And it seems that it is unnecessary to declare upon the new promise. But if this be necessary, yet if the plaintiff has declared upon the original contract, and has replied a new promise to the defendant's plea of bankruptcy, and the defendant has traversed the fact of such new promise, judgment will not be arrested,—since the replication is not a departure in pleading, nor is the issue, thus formed, immaterial.

When, in such case, it is apparent, from the whole record, that the judgment of the court below was correct, and that the same result must have followed, if the plaintiff had declared upon the new promise, judgment will not be arrested.

ASSUMPSIT upon a promissory note, for \$38.99, dated February 5, 1842, and made payable to the plaintiff, or order, on demand, with interest annually. The declaration contained also a count for goods, &c., sold and delivered.

The defendant pleaded, in bar of the action, his discharge in bankruptcy, duly obtained in the district court of the United States, on the 11th day of January, 1843, under the Act of Congress of August 19, 1841. The plaintiff replied that the defendant, after he had obtained his discharge in bankruptcy, as set forth in his plea, promised to pay to the plaintiff the claims specified in the declaration. This replication was traversed by the defendant.

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On trial the plaintiffs offered parol evidence that the defendant, in the summer and autumn of 1843, expressly promised the plaintiffs that he would pay to them the note specified in the declaration, and also the sum of two dollars, which the plaintiffs claimed under the count for goods sold. To this evidence the defendant objected, upon the ground that the promise, in order to be of any force, must be in writing; but the court overruled the objection and admitted the evidence; to which decision the defendant excepted.

After verdict for the plaintiffs the defendant filed a motion in arrest of judgment; which motion was overruled by the court; to which decision the defendant also excepted.

E. Weston for defendant.

The defendant contends that, there is no good and lawful consideration set forth in the plaintiffs' replication; and that, if there is, the promise, to be binding, should have been in writing. It is a rule of law, that a debt, extinguished by a release by deed, cannot be revived by a subsequent parol promise, made without a fresh consideration. *Hall, ex parte*, 38 E. C. L., 428. The defendant, in this case, was discharged by a judgment of the United States' Court, acting under the law of congress, which is of greater binding force, and a more perfect discharge, than the mere act of the plaintiff in executing a release. By the action, of the district court, under the law of congress, the debt was *extinguished*; and if so, no moral obligation existed, on which to found a consideration for a new promise.

Even if a new promise is binding without a fresh consideration, good policy requires it to be in writing.

The replication to the plea of bankruptcy admits that the promises set up in the declaration were before the defendant became bankrupt, and that the same were discharged by the bankruptcy, and sets up and seeks to recover on a new and distinct promise; which is a *departure*. 1 Chit. Pl. 557-560. Gould's pl. 453 *et seq.* *Stoughton v. Mott*, 15 Vt. 169, 170.

J. P. Kidder for plaintiff.

1. A moral obligation is a sufficient consideration, when a good and valid consideration has once existed. Com. on Cont. 23.

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Hawkes v. Saunders, Cowp. 289. A debt, discharged by the operation of the *bankrupt act*, is analogous to one barred by the statute of limitations. In both cases there was once a good and valid consideration, but, by the operation of *law*, both are discharged; or, in other words, by the aid of the law, the party can avoid paying his honest debts;—but there is still a moral obligation on the part of the debtor to answer the debt. Chit. Pl. 61, and cases there cited. Chit. on Bills, 738. *Maxim v. Morse*, 8 Mass. 127. 2 Stark. Ev. 131. 4 Campb. 205. In *England* the point was settled, that a mere promise was sufficient to revive the debt. When they passed a statute, that, in order to have the promise of legal force, it must be made in writing. 6 Geo. 4, c. 16, s. 131.

2. The objection is taken, that the plaintiffs ought to have declared *specially*, upon the new promise. To declare, in these cases, upon the original contract has ever been the settled doctrine of the common law; and we have not been fortunate enough to find even a dictum against this position. Chit. Pl. 61. 2 Stark. 68. 2 Stark. Ev. 131. *Freeman v. Fenton*, Cowp. 544. 4 Campb. 205. *Gailer v. Grinnel*, 2 Aik. 349. *Maxim v. Morse*, 8 Mass. 127. 2 H. Bl. 116. *Leaper v. Tatton*, 16 East 420. *Shipley v. Henderson*, 14 Johns. 178. *Depuy v. Swart*, 3 Wend. 135. Wheat. Selw. 247. The defendant, to save this point in the case, ought to have *demurred* to the replication. If a verdict is against the party tendering the issue, judgment must regularly go against him, for as the fault in the issue commenced on his part, his *traverse* being bad in law, and found to be false in fact, it is unreasonable to arrest the judgment. Goulds Pl. 509–510.

The opinion of the court was delivered by

HEARD, J. The first point made by the defendant is, that there was no consideration for the new promise. This depends upon the condition, in which the discharge in bankruptcy leaves the original debt. It has been argued here that the debt was left unencumbered by any *equitable* or *moral* obligation on the part of the bankrupt to pay it. And if that be so, there would be no consideration for the promise. In the case of *Hall, ex parte*, 38 E. C. L. 426, the court held that a note, given for the amount of a former debt, which had been released by deed, was *nudum pactum*; and,

upon the authority of that case mainly, it has been urged that the promise in this case was without consideration. But we think such is not the law. The effect and operation of the discharge in bankruptcy is to excuse the bankrupt from the payment of his debt;—it in no way annuls or affects the original debt, but suspends the right of action for its recovery. Such is the nature and effect of the statute of *limitations*. That is a perfect bar, while it remains; but it may be removed without any new consideration. The right of action being merely suspended by *favor* of the law, there is still a *moral obligation* and *duty* remaining upon the bankrupt to pay the debt; and that is a sufficient consideration for the new promise.

The next inquiry is, whether this promise should be in writing. It is urged, on the ground of *policy*, that it should be; but I am not aware, that, as a matter of policy merely, a new promise was ever required to be in writing. As a matter of proof, merely, parol evidence is competent, unless otherwise required by statute.

Another point in the case is, that the declaration should have been upon the new promise, and not upon the original debt. We think the balance of authority is the other way; but that question does not arise. The parties joined issue upon the fact of the new promise, and that has been found by the jury. But it is urged, that this was an immaterial issue, or a departure, and that therefore the judgment should be arrested. To this there are two answers. The first is, that this is not a departure; for the replication is in relation to the subject matter of the declaration, and therefore, if the new matter brought forward was either *immaterial*, or insufficient to answer the *purpose*, for which it was put upon the record, the defendant should have demurred, and not traversed. Therefore no question arises upon the declaration.

But if it were a departure, still, if, upon the whole record, the court can see that a correct result followed, and that the judgment is right, the judgment will not be arrested. The court have passed upon the questions, and the jury have found the same facts, that would have entitled the plaintiffs to recover, if the declaration had been upon the new promise.

Judgment affirmed.

Comstock v. Grout.

EDSON COMSTOCK v. JOHN GROUT.

The courts of this state have jurisdiction of questions as to the effect of a discharge in bankruptcy, obtained from the district court of the United States under the Act of Congress of Aug. 19, 1841, upon judgments and contracts which might have been proved under the commission.

A judgment in an action of tort, recovered against one who afterwards files his petition in the district court to be declared a bankrupt, is proveable under the commission, and is barred by the final discharge of the defendant as a bankrupt.

Where judgment was obtained against a defendant in an action of tort, and the court rendering the judgment also adjudged that the cause of action arose from the wilful and malicious act of the defendant and that he ought to be confined in close jail, and he was committed to jail upon the execution which issued on such judgment, and had filed in the district court of the United States, after the rendition of the judgment and prior to his commitment, his petition to be discharged as a bankrupt, and, while he was in confinement, obtained from the district court a final discharge and certificate as a bankrupt, and the plaintiff refused afterwards to discharge him from confinement, it was held, on *audita querela* brought by him against the plaintiff, setting forth these facts, that the action was well brought, and that the effect of the discharge in bankruptcy was to bar any farther prosecution of the judgment against him,—and it was accordingly ordered that he be discharged from imprisonment.

And it was held that it was not necessary that the complainant should allege, in his complaint, that the jailor had refused to permit him to depart from the jail.

And it does not affect the complainant's right to bring *audita querela*, that he might, by possibility, have made a remedy by *habeas corpus*.

AUDITA QUERELA. The complainant alleged in his complaint, in substance, that judgment was recovered against himself and one King, by the defendant, Grout, at the March Term of the Supreme Court in Orange County, 1842, in an action of tort, and that the court also adjudged that the cause of action arose from the wilful and malicious act of the defendants in that suit, and that they ought to be confined in close jail, a certificate of which was duly indorsed by the clerk upon the execution which issued on said judgment; that the defendant, Grout, caused the complainant to be arrested by

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virtue of said execution, and committed to jail in Washington County, where he had ever since remained in confinement; that, after the rendition of said judgment, and prior to his commitment, the complainant had filed his petition in the district court to be declared a bankrupt, pursuant to the Act of Congress of Aug. 19, 1841; that in September, 1842, he was, by the district court, duly discharged, as a bankrupt, and received a certificate thereof; and that the defendant had notice of all these proceedings, but had refused to discharge him from his imprisonment.

To this complaint the defendant demurred.

L. B. Vilas for defendant.

1. The courts of this State have no jurisdiction of the matters alleged in the complaint. It is claimed that an execution has been discharged by operation of a law of Congress and the proceedings of the United States' District Court under that law; if so, it belongs to that court to carry into effect its own decrees and protect the rights of all who claim relief thereby.

2. If this court had jurisdiction, and the complainant has any relief in the state courts, *audita querela* is not the appropriate remedy. This action can only be maintained, where the defendant has been guilty of some wrong, for which the complainant is entitled to recover damages. Can the court say that this defendant shall pay damages, for not discharging the complainant from jail, where he had been legally placed; and when the defendant had done no act to change the legality of the commitment. This would seem to be giving a *remedy* without a *wrong*.

3. If the complainant was discharged by operation of law, the debt would remain good against King; but if the creditor discharge one, the debt is discharged against both. Hence we insist that this ground alone is a sufficient reason for the defendant's refusal to discharge the complainant.

O. H. Smith for plaintiff.

The plaintiff contends that *audita querela* is the proper remedy, and the only remedy, by which he may obtain his discharge from further imprisonment on the execution. *Brackett v. Winslow et al.*, 17 Mass. 153. 2 Saund. 148 a, n. 1. 13 Vt. 255. 3 Bl. Com.

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405. *Staniford v. Barry*, 1 Aik. 321. *Baker v. Judges of Ulster*, 4 Johns. 191. *Lovejoy v. Webber*, 10 Mass. 101. The provisions of the 34th and 35th sections of chap. 103 of the Revised Statutes do not extend to a case like the present. It may well be doubted whether a writ of *habeas corpus* is an appropriate remedy, as the creditor has a right to plead to the matter of bankruptcy, and have it tried by a jury. The United States' court has no jurisdiction to grant relief by *habeas corpus*, where a person is in custody on state process, for any purpose whatever. This court, therefore, alone, has the power to grant relief; and as the certificate in bankruptcy does not make the imprisonment void, by judgment of court, like a certificate of jail commissioners, but voidable merely, like a release of the debt, there would seem to be no appropriate remedy, but an *audita querela*, where the matter of discharge may be litigated.

The opinion of the court was delivered by

HEBARD, J. This is an *audita querela*, brought to set aside an execution, upon which the complainant was committed to jail in Washington County. The judgment was rendered at the March Term of this court, 1842; the complainant was committed to jail upon the execution April 4, 1842; and on the first day of September, 1842, he obtained his discharge in bankruptcy. The complainant farther alleges that the defendant had notice of this discharge, and that he refused to release him from his imprisonment. To this complaint there is a general demurrez; and this presents the question, whether the complainant is entitled to the relief sought.

It is objected, in the first place, that this court have no jurisdiction of the matters alleged in the complaint,—that whatever relief there is in the case must come from the district court. As a practical answer to that, it is said that the district court have been applied to and refused to grant the relief,—not having the power.* It does not become necessary to give any opinion upon the correctness of that conclusion, for this application must depend upon its own merits. It is not to be sustained, upon the ground that there

*See the case *In re Comstock*, 5 Law Rep. 163, where the decision of the district court, upon the application of this complainant to be relieved by that court, is reported at length.

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is no other *remedy*, nor is it to be denied, upon the ground that there is *another* remedy; for there may be cases where there is no remedy, and there are cases where there are several remedies.

The objection that is here made, that this court have no jurisdiction of the subject matter of the complaint, would apply with equal force to every plea of bankruptcy, that is filed to *bar a recovery*. In that case the *defence*, that is urged against a right to recover a judgment, comes from the proceedings in the district court. In this case the complainant relies upon the same determination of the district court, to be relieved from imprisonment upon the judgment of the state court. There is, therefore, the same conflict in the two courts, and the same want of jurisdiction in one case, as in the other;—and we see none in either. In one case it operates to suspend the right of recovery; in the other case it suspends the operation of a judgment already recovered; and we are unable to perceive that state sovereignty is cast into the shade any more in one case, than in the other.*

It is farther objected, that, if the state courts have jurisdiction of the matters specified in the complaint, *audita querela* is not the appropriate remedy;—and for two reasons,—the first of which is, that the defendant has been guilty of no wrong. It is usual to charge fraud and wrong upon the defendant in all cases, when the remedy is sought by *audita querela*; but in many cases the wrong is rather *permissive* than *actual*. It would be impossible to notice all the cases, in which this action has been sustained, where the wrong complained of was not the direct act of the defendant. In *Phelps v. Slade et al.*, 13 Vt. 195, *audita querela* was sustained to set aside an execution, which issued irregularly by the mistake of the *clerk*, or *attorney*. So in *Tyler v. Lathrop*, 5 Vt. 170, where the justice refused to allow an appeal, in a case in which the party was entitled to claim an appeal. And in *Phelps v. Birge*, 11 Vt. 161, the judgment of a justice of the peace was set aside, on *audita querela*, for the reason that the action was not duly entered before the justice within two hours from the time set for trial. From these cases, and a variety of others, it will be seen, that although, as is said in the case of *Little v. Cook*, 1 Aik. 363, it is a process which bears solely

*See *Ward v. Jenkins et al.*, 8 Law Rep. 538.

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upon the wrongful acts of the opposite party, yet this is to be taken with some such limitation as I have already suggested.

But it may, in this case, be said that the defendant is guilty of a wrong. The complainant has, by the provisions of the bankrupt act, and the proceedings under it, obtained a certificate and discharge from all such debts as existed prior to, and might have been proved under, the commission. It is wrong that the defendant should hold him restrained of his *liberty*, when the debt, upon which he is committed, is discharged.

But it is farther said, that it is not alleged in the complaint that the jailer refuses to release the complainant. This we think unnecessary to be alleged. The jailer has no discretion to use. He is bound to keep such prisoners as are committed to his care, when the commitment is legal, until they are discharged by some proceedings under the *law*, or by the *creditor*. The sheriff is strictly an executive officer, and has no discretion to vary or depart from the fixed and well defined duties of his office.

Another objection, which has been urged as a reason why *audita querela* is not the proper remedy, is, that the complainant may have relief by *habeas corpus*. The answer to this objection has been in part anticipated. The writ of *audita querela* may lie, although there is another remedy. In this case the complainant could not know but what the defendant might wish for the intervention of a jury, to try the validity of his *discharge*; and if he is not entitled to the trial by jury, it forms no ground of complaint for him that the opportunity has been given to him. In the case of *Brackett v. Winslow et al.*, 17 Mass. 153, the court seem to suppose that the plaintiff had other remedies,—that he might have been relieved by *habeas corpus*, or that he might have had his action of trespass to recover damages,—but still the court held that *audita querela* was a proper remedy. The action of *audita querela* is concurrent with other remedies, in some instances; and in other cases, as in *Dodge v. Hubbell*, 1 Vt. 491, there is no remedy.

Our statute prescribes the form of proceeding in this action; but the cases, in which it is a suitable remedy, are left to be determined by the rules of the common law. But it being, as has been said, in the nature of a bill in equity, it is very difficult to define the particular cases, in which it will, or will not lie; for in these cases, as

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in cases in equity, each case will have its characteristics, and its peculiar features. This general rule, however, has always been adhered to, except in the case of infants, that it will not lie, when the party has had an opportunity to make his defence, or where the injury, of which he complains, is to be attributed to his own fault, or neglect. No part of this rule applies to the present case. The complainant has had no opportunity to make his defence. Whether he has any other remedy is at least doubtful. We do not decide that he has not. He might make his application to the county court, to fix the time for his taking the poor debtor's oath; but that would leave the debt in force against him; whereas, to have the intended benefit of his certificate and discharge, he should be relieved from the debt. Whether he could be relieved by *habeas corpus* is more doubtful. Usually that proceeding only involves an inquiry into the legality of the commitment; and that is to be determined by the record. If that was to be the rule, no relief could be given in this case, as the commitment was legal, and all that now exists, as a reason for relieving the complainant, is matter *dehors* the record. But to this rule there may be exceptions.

But, aside from the reason and fitness of the remedy, we think it fully sustained by authority. The cases collected and cited in 2 Saund. Rep., in notes, recognize, in repeated instances, the doctrine, that *audita querela* will lie, to discharge the complainant from imprisonment, when the cause of complaint arose after the commitment, and when the only fault, or *wrong*, in the defendant was in not discharging him.

This subject was before this court in Rutland county;—but the question in this case was not involved in that. There the complainant had been admitted to the liberties of the jail yard, and could leave when he pleased. He needed no interposition of the court for any purpose, except to adjudicate in advance what would be his liability upon his bond, in case he should leave the *limits*, and the creditor should think it best to commence a suit against him. He was under no restraint from the law, nor the officers of the law. He was merely restrained by his contract; and the court left him to judge of the nature and extent of that obligation, and the propriety of remaining upon the *limits*,—where he had bound himself to stay,—or to leave, and trust to his defence, that his certificate would

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enable him to make,—as his own judgment, and such advice as he should avail himself of, should incline him.

The judgment in this case is, that the complaint is sufficient, and that the complainant be discharged from imprisonment, and that he recover one cent damages, and his costs.

The defendant, on application for that purpose, had leave to withdraw his demurrer, on payment of costs to this time, and the case was continued, in order that he might plead to the complaint.



SOLOMON DOWNER v. HORACE DANA AND CHESTER BAXTER.

[IN CHANCERY.]

The court of chancery will decree a set-off of debts, in fact mutual, although not so in form,—as when, on one side, the debts are joint, and, upon the other side, several, if one of the joint debtors is a mere surety,—especially when he, from whom the several debt is due, and against whom the set-off is asked by the real debtor in the joint debt, is insolvent.

APPEAL from the court of chancery.

The orator set forth, in his bill, that, in the spring of 1838, the defendant Dana had a draft upon a firm in Worcester, Massachusetts, for about the sum of \$3821.00, and that an arrangement was made between Dana, the orator and the defendant Baxter, by which the orator and Baxter were to receive the said draft, and use the avails thereof for their individual benefit, and account severally to Dana for the amount received and used by each respectively; that Baxter received, of the avails of the draft, about \$1580.00, and the orator received the balance; that Baxter afterwards paid to Dana \$1535, in part payment for the amount received by him, and took Dana's receipt therefor; and that the orator had always been willing to account for the portion of the avails of the draft, received by him, to Dana, by offsetting the same against large demands which he had against Dana; but that Dana had refused so to arrange the matter.

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The orator farther alleged that in December, 1838, Dana commenced an action for the avails of the said draft against the orator and Baxter jointly, and recovered judgment in said action, against the orator and Baxter, at the June Term, 1841, of Orange county court, for \$2740.70 damages, and costs, and that an execution had issued upon said judgment, and that the property of the orator had been taken, and was about to be sold, to satisfy the same. The orator farther alleged that he recovered judgment against Dana, in an action of account in his favor against him, at the May Term of Windsor county court, 1840, for the sum of \$3278.29 damages, and costs; that the said Dana was, at the time of bringing this bill, and for more than three years had been, totally insolvent; that the orator had applied to Dana to offset the one judgment against the other, which Dana had declined doing; and that the orator had applied to Baxter to join with him in bringing this bill, and that Baxter had refused to do so, wherefore he joined him as defendant.

The orator prayed that the judgment recovered by him against Dana might be set off in part against the judgment recovered by Dana against him and Baxter, and that Dana might be perpetually enjoined from prosecuting said judgment, and that, in the mean time, and until a decision could be had in the case, Dana might be enjoined from taking any measures to collect said judgment.

An injunction was granted, upon the issuing of the bill, as prayed for.

The defendants answered, admitting, in substance, the allegations of the bill, as above detailed, except that Dana claimed that the orator and Baxter were, by the agreement between the parties, to be jointly liable for the avails of the draft; and he insisted that they were estopped, by the judgment of the court of law, from litigating that question.

The court of chancery decreed that the temporary injunction, granted by the chancellor, should be dissolved, and that \$2824.98 of the judgment in favor of the orator against Dana should be set off and applied on the judgment in favor of Dana against the orator and Baxter, and that each of said judgments be so far satisfied, the application to be made as of the date of the latter judgment, and that, as to so much, the said Dana should be perpetually enjoined

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from prosecuting or collecting his said judgment against the orator and Baxter, and that Dana pay the orator's costs in this suit.

L. B. Vilas for orator.

1. We maintain that judgments, not only in the same court, but in different courts, may be *set off* against each other at law;—and, in cases not within the statute of set off, chancery will permit an equitable set off, if, from the nature of the claim, or the situation of the parties, justice cannot otherwise be done. *Lindsay v. Jackson*, 2 Paige, 581 and cases there cited. The insolvency of one of the parties is a sufficient ground for the court to exercise its equitable jurisdiction, in allowing an equitable set off; *Lindsay v. Jackson*, 2 Paige 581; *Simpson v. Hart*, 14 Johns. 63; *Pond v. Smith et al.*, 4 Conn. 297; *Reed v. Bank of Newbury*, 1 Paige, 215; *Ex parte Quinten*, 3 Ves. 248; so non residence of the party, against whom the set off is prayed, is, in general, sufficient to authorize it. 2 Eq. Dig. p. 92, pl. 15, and cases there cited.

2. We admit the general principle, that joint debts cannot be set off in equity, any more than at law, against separate debts, unless there be some other equitable circumstance to authorize it,—such as insolvency, non residence, &c.; *Jackson v. Robinson*, Mason 138, 145. The power of a court of chancery (it is said,) to offset one judgment, or decree, against another, on motion, is the same as that of the common law courts. But, on a bill filed for an offset, the jurisdiction of the court of chancery is more extensive than that of common law courts. *Dunkin v. Vandenberg*, 1 Paige 622.

3. It is no objection to the set off of one judgment against another, that the party making the application has the adverse party in execution on the judgment. *Utica Ins. Co. v. Power*, 3 Paige 365.

L. B. Peck for defendants.

1. The offset ought not to be allowed, as the judgments are not mutual. The judgment in favor of Dana is against the orator and Baxter, while the orator's judgment is against Dana only. On this subject the rule is the same in equity as at law. If to this rule

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there be any exceptions, it must arise under particular circumstances, as where there is a clear series of transactions, in which a joint credit is given. Mere insolvency, we submit, is not a circumstance sufficient of itself to justify the interference of the court. *Palmer v. Green*, 6 Conn. 14. *Ex parte Stephens*, 11 Ves. 24. *Ex parte Hanson*, 12 Ves. 348. *Dale et al. v. Cook*, 4 Johns. Ch. R. 11. *Vallamy v. Noble*, 3 Mer. 393, 618. 2 Story's Eq. 663.

2. The attorneys of Dana have a *lien* on his judgment for disbursements, &c., of which they ought not to be deprived by the offset. The offset should not be extended to the costs. The decree of the chancellor should, for this reason, be reversed.

The opinion of the court was delivered by

REDFIELD, J. The object of this bill is to obtain a set off of the separate debt of Dana against a judgment, which he has recovered against the orator and Baxter. The fact that the claim, out of which the judgment arose, was the joint debt of Downer and Baxter, is conclusively settled, as to these parties, by the judgment itself. The parties being the same here as in the suit at law, their different position, as to being plaintiffs and defendants, will not enable them again to litigate that question.

The facts in the case, which are admitted substantially in the answer, are, that Downer and Baxter borrowed the money of Dana, for which the judgment is rendered, upon their joint credit, but for their separate use; and that the money was applied to their separate use in the same proportion set forth in the bill. So that now, *in fact*, that portion of the judgment, which the orator prays to have set off against his private demand upon Dana, is his own separate debt to pay, for which Baxter is merely surety, as between them,—and if Baxter is compelled to pay it, he will immediately recover it of Downer. In addition to this, Dana is, confessedly, wholly insolvent; so that, if Downer is compelled to pay the judgment, or if Baxter is compelled to pay it, that portion of it, which belongs to Downer to pay, becomes a dead loss to Downer, and a net gain to Dana. This is a result which a court of equity, acting upon principles of natural justice, would desire to prevent, if it could be done without trenching upon established principles of law.

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These debts are, *in fact*, mutual, so far as Downer's portion of the judgment is concerned, although not so *in form*.

I have no disposition to go much into detail into the principles, which have governed courts of equity in decreeing a set off of debts, which could not be set off at law. It is certain that such a department of the jurisdiction of courts of equity has been known, long anterior to the English statutes of set off, and that, since the passing of those statutes, it has not wholly ceased. Before the existence of those statutes, it seems to have been confined to the setting off of debts, when there was supposed to have been some mutual credit, some understanding that the one debt should go against the other. This was adopted from the rule of the civil law, called *compensation*, by which, whatever might be the extent of the dealings between the parties, only the final balance was treated as a *debt*. The same rule always obtained at law, in regard to a current account between parties. If one party sued for any portion of the account, the other was at liberty to go into the examination of the whole account, and show that nothing was due; and this might be done without the necessity of a plea of set off. *Dale v. Sollet*, 4 Burr. 2133. *Green v. Farmer*, Ib. 2214.

Since the statutes of set off, and those of bankruptcy, courts of equity, it is admitted, have, in decreeing a set off, usually followed the same rules adopted in courts of law. But there have been some deviations, in order to prevent gross injustice. The doctrine of *compensation*, of the civil law, is one of absolute justice, that there should be a final settlement of all dealing between the parties, and the one finally in arrear should only be considered debtor, and to the amount of the balance only. But this has never been attempted to be enforced to the full extent; for if that were to be done, the entire litigation of matters of debt would be superseded in courts of law, and be transferred to courts of equity. All that has been attempted has been, to effect this, when manifest injustice would otherwise ensue. Accordingly courts of equity have decreed a set off,

1. When there is some connection between the demands, as by mutual debt, or credit, each looking to the debt of the other for compensation. The set off has often been decreed, in such cases, when the only evidence of this mutual credit resulted from the

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course of dealing between the parties. *Hankey v. Smith*, 3 T. R. 507, and note. *Olive v. Smith*, 5 Taunt. 60, [1 E. C. L. 16.] These last are decisions under the bankrupt laws; but those acts only go to the extent always recognized in courts of equity. 2 Story's Eq. 659, 660. *Lanesborough v. Jones*, 1 P. Wms. 326. When there is an express agreement to set off debts, courts of equity will always enforce a specific performance of such agreement.

2. Although a court of equity will not, any more than a court of law, allow a set off of joint debts against separate debts, yet there are many exceptions. One important exception is; where the debts are in reality mutual, although not so in form; as where one of the joint debtors is a mere surety. That we consider to be the present case, to the extent the set off is asked. *Dale v. Cook*, 4 Johns. Ch. Rep. 15, on the amended bill. 2 Story's Eq. 664.

It is not necessary to discuss the question how far the insolvency of one of the debtors may affect the equity of the set off. For one, as at present impressed, I cannot avoid the conviction that insolvency itself may be, in some cases, a very urgent ground of interference by courts of equity to decree a set off, when such an interference does not lead into the settlement of complicated dealings between the joint debtors. *Simpson v. Hart*, 14 Johns. 63. *Peters v. Soames*, 2 Vern. 428.

The rule adopted in this case is not so broad, in favor of equitable interference in decreeing a set off, as that laid down in *Ferris v. Burton*, 1 Vt. 439.

The decree of the chancellor is affirmed, with costs.

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WASHINGTON.
MARCH TERM, 1845.

PRESENT.

HON. STEPHEN ROYCE,	} ASSISTANT JUDGES.
HON. ISAAC F. REDFIELD,	
HON. MILO L. BENNETT,	
HON. WILLIAM HEBARD,	

SAMUEL M. ORCUTT v. TOWN OF ROXBURY.

Where a town voted to hold their town meetings at the house of the plaintiff, who was one of the inhabitants of the town, and, at the town meeting at which the vote was taken, it was publicly stated, in the hearing of the plaintiff, that he would ask nothing for the use of his house, only that the select men should grant him a license to sell liquor, on town meeting days, at his house, and the plaintiff made no objection, at the time this statement was made, it was held that proof of this, coupled with evidence that the plaintiff did afterwards usually take a license to sell liquor at his house on town meeting days, would justify the conclusion that the plaintiff so understood the terms upon which the meetings were to be held at his house, and that he had, therefore, no right to claim payment from the town for the use of his house, unless he had subsequently revoked the license, and given the town notice that he should claim pay.

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But notice, merely, that he could not any longer have the meetings held at his house, without proof that he also gave notice that he should, after that, claim pay, and without proof of any express promise on the part of the town to pay, was held insufficient to entitle him to recover for such use.

ASSUMPSIT to recover for the use of the plaintiff's dwelling house for the purpose of holding therein town meetings. Plea, the general issue and the statute of limitations, and trial by jury.

The plaintiff, to support the issue on his part, introduced evidence tending to show that in 1817, or 1818, the town voted to hold their town meetings at his dwelling house; that they did hold all their meetings in his house until March, 1842, when they voted to remove to another place;—and that, during the time that the meetings were so holden in the house of the plaintiff, he was put to trouble in removing his furniture, and in washing and cleaning his house, to the amount of five dollars a year.

The defendants then gave evidence tending to show, that, at the time the town voted to remove the meetings to the house of the plaintiff, it was stated in town meeting, and in presence of the plaintiff, that, if the meetings were moved to the house of the plaintiff, he would claim nothing for the trouble of having them there, only that the select men should license him to sell liquor on town meeting days,—that the select men did so license him, whenever he requested it, and that he generally had such license.

The plaintiff then offered to prove, that, some eight or ten years before the meetings were removed from his house, he requested the town, in town meeting, to build a town house, and there stated that he could not any longer have the meetings holden in his house; but that the town did not build a town house, and continued to hold their meetings in his house, as before, until they were removed in the spring of 1842; to which evidence the defendant objected, and it was excluded by the court.

The court charged the jury, that, if they found, that, at the time the meetings were removed by vote of the town to the house of the plaintiff, it was stated in his presence that he would claim nothing but the privilege of selling liquor, as above stated, and he did not object to it, and that he had license granted him by the select men for that purpose, whenever he requested it, he was not entitled to

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recover, unless he had given the town notice that he should claim pay.

The jury returned a verdict for the defendants. Exceptions by plaintiff.

J. L. Buck for plaintiff.

L. B. Peck for defendants.

The opinion of the court was delivered by

HEBARD, J. The plaintiff, in this action, seeks to recover of the town pay for the use of his house for the town to hold *town meetings*. The case finds that meetings were held at his house from about 1818 to 1842, and that, at the time the town voted to hold the meetings at the plaintiff's house, it was stated in the plaintiff's hearing that he would claim nothing for his trouble, only that the select, men should grant him a *license* to sell liquor, on town meeting days, at his house,—and that they did license him, whenever he requested it,—and that he generally had a *license*. The fact that he did not contradict the statement, thus made in his hearing, in connection with the fact that he afterwards *took a license* to sell liquor, would justify the conclusion, that he so understood the terms, upon which the meetings were to be held at his house. The court instructed the jury, that, if such was the fact, the plaintiff was not entitled to recover, unless he had given the town notice that he should claim pay.

The question depends mainly upon the correctness of this charge ; and we think that this was as favorable, as the plaintiff was entitled to have. The plaintiff offered to prove, that, eight or ten years before the meetings were removed from his house, he requested the town, in town meeting, to build a town house, and then stated that he could not any longer have the meetings holden in his house. There is no doubt, that the plaintiff was at liberty to terminate that *license*, whenever he pleased ; and, having done so, and given notice that he should no longer continue that arrangement, he might close his doors against any person that came there. But the important inquiry is, whether he can be permitted to recover of the town, without any promise on the part of the town to pay him, or notice to the

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town, on his part, that he should claim pay. There are few cases, in which any thing is to be taken against towns by mere implication. Their liabilities to support their poor, and to build roads, and pay damages for injuries occasioned by the insufficiency of their roads, are matters *stricti juris*; and the nature and extent of those liabilities are fixed and defined by statute. And it has been holden that towns are not liable to pay their officers for their *services*, without an express engagement to do so. *Boyden v. Brookline*, 8 Vt. 284.

We therefore think that the testimony offered by the plaintiff was not sufficient to impose a liability upon the town, and that it was therefore correctly rejected.

Judgment affirmed.



HEMAN PARKHURST v. ALLEN SPALDING.

Where a judgment has been rendered for a sum less than \$100, but, with the interest due upon it, would exceed \$100, the judgment creditor may waive his claim for interest and sustain an action before a justice of the peace for the amount of the judgment alone.

Where, in such case, the declaration before the justice of the peace described the judgment correctly, and concluded, generally, "to the damage of the plaintiff, as he says, one hundred dollars," and in the county court the plaintiff filed a new declaration, claiming to recover the *debt* only, and making no claim for *damages*, it was held that the action should not be dismissed for want of jurisdiction in the justice before whom it was originally commenced.

DEBT upon a judgment, for \$71.63 damages and \$3.05 costs of suit, recovered Nov. 23, 1835, and on which there was due, with the interest, at the time of the commencement of this action, a sum exceeding one hundred dollars. This action was commenced before a justice of the peace, and the declaration, after describing the judgment declared upon, and averring that it remained unsatisfied, concluded, generally, "To the damage of the plaintiff, as he says, one hundred dollars." The case was brought to the county court by appeal, and the plaintiff there filed a new declaration, which,

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after describing the judgment, &c., as in the original declaration, concluded in these words,—“To recover which said debt, with just costs, he files this declaration.”

In the county court the defendant filed a motion to dismiss the action, for want of original jurisdiction of the same in the magistrate before whom it was commenced. This motion was overruled by the court; and judgment was rendered for the plaintiff, for the amount of the debt described in his declaration, without interest. Exceptions by defendant.

J. L. Buck for defendant.

That a party may recover interest on a judgment is well settled; *Martin v. Kilbourne*, 11 Vt. 93; Sl. St. 216; Rev. St. 239, § 2; *Allen v. Adams*, 15 Vt. 16; and, if recoverable, it necessarily forms a part of the debt and should be added to the principal. If this be so, the county court erred in overruling the motion to dismiss,—because the sum due at the time of the commencement of the suit before the justice exceeded one hundred dollars.

O. H. Smith for plaintiff.

Interest is the accident of a claim, and not the substance thereof,—except in cases where the contract specially provides for the payment of interest,—and may be waived. *Phelps et al. v. Wood*, 9 Vt. 399. *Stone v. Winslow*, 7 Vt. 388. It is not the amount of injury sustained, but the amount in demand and actually sought to be recovered, which forms the test of apparent jurisdiction. The plaintiff is not, generally, bound to ask all, that he is, in justice, entitled to recover. He may demand less, and thereby confer jurisdiction upon a justice court. *Wightman v. Carlisle*, 14 Vt. 296. That the declaration in the justice writ concludes as it does determines nothing, as to the character of the claim sought to be recovered, or its amount; nor can it be determined therefrom whether the plaintiff seeks to recover interest, or not.

The opinion of the court was delivered by

BENNETT, J., This suit was originally brought before a justice of the peace, upon a judgment, which, adding thereto the interest, exceeded one hundred dollars in the whole. In the declaration before the justice the plaintiff did not declare technically for debt and

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damages, but concluded his declaration in general terms, *to his damage one hundred dollars*. In his declaration in the county court he only goes for the debt, and claims no damage for its detention. The only question, raised in this case, is, as to the appellate jurisdiction of this court.

In *Stevens v. Pearson*, 5 Vt. 503, it was held, that, in a general action for monies had and received, the *ad damnum* determined the jurisdiction of the justice, and that the plaintiff's recovery must be limited to his *ad damnum*, even though he exhibited on trial claims exceeding one hundred dollars, and that, even if he claimed an allowance on his demands exceeding the jurisdiction of the justice, still the court might render judgment for any amount not exceeding the *ad damnum*.

In the case now before us, we think the *ad damnum* must govern the question of jurisdiction, whatever might be the result, in a case where the judgment itself, upon which the action was brought, exceeded one hundred dollars, but the *ad damnum* in the declaration concluded with a sum within the justice's jurisdiction. If the plaintiff chose to *wave* either the whole, or any part of his claim to interest on the judgment, he had that right. The interest on a judgment is given as damages, simply, for the detention of the debt, and is only incidental to it. No action could be maintained to recover the interest alone. When once the principal of the judgment was discharged, all claim for interest on it was gone.

This is not like the case, where the payment of interest is a part of the contract itself. Though the plaintiff might insist upon his debt, and damages for its detention, which, in the whole, might exceed one hundred dollars, yet the law is not compulsory upon him. It might as well be claimed, that the plaintiff should be compelled to charge interest on his book account, so as to defeat the jurisdiction of a justice, in a case in which he would otherwise possess it.

The judgment of the county court is affirmed.

Follett et al. v. Murray et al. & Tr.

**FOLLETT & BRADLEY v. MURRAY & SCOTT, and JOHN WAITE
AND JOSEPH KINGSBURN, Trustees.**

Where a deposition was taken and filed, to be used as evidence in a suit, and the original deposition was destroyed by accident, it was held that a copy of the deposition,—the witness being still living,—could not be used as evidence on the trial.

TRUSTEE PROCESS. Judgment was rendered against the principal debtors, and the trustees filed their disclosures, upon which, with testimony *aliunde*, trial was had. On trial a copy of the deposition of one Samuel Mower, which deposition was taken and filed, to be used as evidence in the case, was offered in evidence,—it being proved that the original deposition had been burned, and that the copy offered was a true copy, and that it had been filed in the clerk's office after the destruction of the original. The copy offered did not contain a transcript of the caption and certificate appended to the original deposition; but the affidavit of the attorney of the trustees was filed, stating, that he believed that the caption and certificate were in due form of law. To the admission of this copy, as evidence, the plaintiff objected; but the objection was overruled by the court, and the evidence admitted; to which decision the plaintiffs excepted.

H. Carpenter for plaintiffs.

Weston, Kidder and *L. B. Peck* for trustees.

The opinion of the court was delivered by

BENNETT, J. We think there was manifest error in the county court, in admitting in evidence the copy of Mower's deposition. The court, upon proof that the original deposition had been destroyed, and that the copy, which had been filed with the clerk, was a true copy, permitted it to be read. The deponent was not dead, so as to make that a ground for admitting secondary evidence; the original deposition had never been used upon a previous trial; and no copy of the caption or certificate purports to have been given or proved. We know of no rule of law, that makes the copy of the

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deposition admissible. Though it was a great misfortune, that caused this, and other valuable papers, to be destroyed in the burning of the court house, yet, if we admit this copy, it must furnish a rule for the admission of copies in all cases, upon proof that the originals have been destroyed,—and that, too, without any proof as to the caption and certificate being originally correct.

A new deposition, in this case, can be taken; and we think it should be done, rather than make an innovation upon the rules of evidence, which would, in its consequences, be prejudicial in the administration of justice.

For this cause the judgment of the county court must be reversed.



LEBBEUS BENNETT AND OTHERS v. JOSIAH STICKNEY.

A general appearance, entered, by the defendants in a suit, upon the docket of the court, and submitting to the jurisdiction of the court, by pleading to the merits of the suit, is a waiver of any defect of service, which might have been taken advantage of by pleading.

When a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit on the part of the defendants; and an appearance in the suit, entered by the attorney thus employed, will be binding and conclusive upon the other partners.

AUDITA QUERELA, brought to set aside a judgment rendered against the plaintiffs and one Harvey Tilden. The case was submitted to the court upon the following statement of facts, agreed to by the parties.

The writ in the suit in favor of Stickney against the present plaintiffs and said Tilden was never served on any of the plaintiffs. The plaintiffs and Tilden were partners in trade, and Tilden, who was the active partner, acknowledged service, in behalf of himself and the other partners, by signing, on the back of the writ, a certificate that the same had been legally served,—which certificate he signed as “agent.” The said suit was entered in court at the

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April Term of Washington county court, 1843, at which term Tilden employed J. L. Buck, an attorney, to review said cause; and said Buck entered a general appearance, upon the docket of the court, for the defendants, and judgment was rendered in favor of Stickney, and a review was entered. It did not appear that the plaintiffs in this suit had any notice of that suit, until after said April Term, 1843, except as above stated. At the November Term of said county court, 1843, said Buck requested to have his name erased from the docket, for the reason that he had ascertained that no notice had been given to the other defendants, besides Tilden, and that they denied the right of Tilden to acknowledge service for them. The attorneys of Stickney objected to said erasure, and the court rendered judgment against all the defendants in the suit.

- Upon these facts the county court decided that *audita querela* could not be sustained, and rendered judgment in favor of the defendant; to which decision the plaintiffs excepted.

J. L. Buck, for plaintiffs, cited *Smilie v. Reynolds et al.*, 1 Vt. 148.

Th. & H. H. Reed, for defendant, to the point that a general appearance for the defendants by attorney, in an action, covers all defects of service, cited 1 Tidd's Pr. 434; 3 Bl. Com. 287 n.; 3 Cranch 496; 1 Chit. Rep. 129; 21 Maine Rep. 38; and, to the point, that it makes no difference that such appearance is entered without the knowledge, or consent, of all the parties, cited 1 Salk. 86, 88; 1 Binn. 214; 3 Dallas 331; 7 Pick. 138; 6 Johns. 34, 296; 7 Johns. 539; *Coit et al v. Sheldon*, 1 Tyl. 390; *Sheldon v. Kelseys*, Brayt. 26.

The opinion of the court was delivered by

HEBARD, J. The plaintiffs and one Tilden were partners. The defendant sued out his writ against the firm; and Tilden, who was the *active* partner, accepted service on the same for himself and the rest. The writ was in no other way served. Tilden employed counsel, who appeared generally in the case, and submitted to a judgment, and entered a review. At the next term of the court the

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attorney withdrew his appearance, and the defendants in that suit, who are the plaintiffs in this suit were defaulted ;—and that is the judgment sought to be vacated by this proceeding.

This subject has received its share of the attention of the court on the present circuit ; and two cases have been considered, which embrace all that is involved in this case. The two branches of the inquiry in this case involve the question, how far an appearance, which is general, and submitting to the jurisdiction of the court, is to be regarded as a waiver of any defect of service, that might have been taken advantage of by pleading ;—and also an inquiry, in relation to the authority of one partner to appear for all, and to employ an attorney, whose appearance shall be binding and conclusive.

The case of *Spalding et al. v. Swift*, decided on the present circuit, in Addison county, was where a suit was instituted against a firm ; one of the partners lived out of the State ; a single copy was left with the partner living in the State, and he employed an attorney,—as in this case,—and the absent partner was held bound by the employment and acts of the attorney. The other case referred to is that of *Newcomb et al. v. Peck et al.*, reported *ante*, page 302. These two cases are fully decisive of the one under consideration.

Judgment affirmed.



LUTHER CROSS v. JEREMIAH T. MARSTON.

If personal property be attached by a third person to a building, of which such third person is the owner, and used as part of the furniture of the building, for the convenience of the business of its occupants, but be attached in such manner, that it can be removed without injury to the building, and without injury to the property, it does not thereby become a part of the freehold, so as to pass by deed from the owner of the building to a purchaser of the premises.

And though the owner of the chattel may have had knowledge of its being placed, by the owner of the building, in the situation in which it was, and may have permitted it to remain in such situation, without reclaiming it,

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for a period of five years, and until after the owner of the freehold has sold and conveyed it, with its appurtenances, to a stranger, yet the owner of the chattel has not thereby lost his right to reclaim it, but may maintain trover for it against the purchaser of the building.

/ The question, in such case, is, whether the chattel have, by the manner of its annexation to the freehold, so far lost its *identity*, as to cease to have a legal existence as *personal property*; and if it have not, there can be no *inference* of acquiescence, on the part of the owner, in its becoming a fixture, if he have not stood by, and seen it sold to the purchaser, without objection.

/ In this case, a case of drawers and the sash of a show case were, by the consent of the owner of them, placed in a building, which the owner of the building was fitting up for a book store, and were, by the owner of the building, fastened in their places with nails, but in such manner, that they could be removed without injury to them, or to the building; the owner of the building then leased it for a bookstore, and it was occupied as such for five years, with the drawers and sash remaining as they were, when placed there, and then the owner of the building sold and conveyed it, by warranty deed, with the appurtenances, to one who had, for four years, occupied it as a book store under a lease; and it was held that the drawers and sash still remained the personal property of the original owner of them, and that he might maintain trover for them against the purchaser of the building.

TROVER for a case of drawers and a show case. Plea, the general issue, with notice of special matter of defence, and trial by jury. On trial the evidence on the part of the plaintiff tended to prove the following facts.

A shop in the village of Montpelier was owned by one Jenkins, and by him occupied as a goldsmith's shop until the time of his decease, which was in 1836. Before his decease he had mortgaged the premises to the plaintiff and Ira Day, to secure a debt due to them as partners. While Jenkins was occupying the shop he had procured the drawers in question, made to fit in a particular part of his shop. The witnesses, who were accustomed to make such articles, testified that this case of drawers was made separate and entire and then placed in the spot where it was made to fit. At this time they were not in any manner fastened to the building. The show case stood upright upon the top of the drawers. Upon the decease of Jenkins, his administrator claimed those articles as personal property, and, notwithstanding the remonstrance of the plaintiff,—who

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claimed them as fixtures belonging to the building,—he sold them at auction, and the plaintiff became the purchaser. After the sale the plaintiff removed the case of drawers to the store occupied by himself and Day, where it remained until the spring of 1838. In July, 1836, the plaintiff released his interest in the premises to Ira Day. In the spring of 1837 said Day, having then acquired the entire title to the premises, rented them to one Barker, for a post office; and Barker used the show case for the convenience of the post office,—the sash being separated from the case and used as a partition. In the spring of 1838 Day fitted up the building for a book store, and leased the same to one Clark. The case of drawers was put in its original place, and nailed to the wall, and open shelves were placed in the space above. The sash of the show case was used to cover an open book case, which was permanently fastened to the wall of the building,—the sash sliding in a place before the book case, and being fastened in by strips of board nailed above and below. Clark occupied the building in this manner for a year, or more, and then Day leased it, in the same condition, to the defendant, for the same purpose; and the defendant occupied it until April 22, 1843, when Day sold and conveyed the premises to him, by warrantee deed, describing the premises as “the land, and building thereon standing, with the appurtenances, beginning,” &c. The partnership between the plaintiff and Day was dissolved in February, 1835; and in February, 1842, the plaintiff conveyed all his interest in the partnership property to Day. It appeared, that, during all the time since 1836, the plaintiff had resided in the village of Montpelier, and no question was made, but that he knew of Day's removing the case of drawers from the store to the shop aforesaid. The plaintiff claimed to recover only for the drawers and sash and glass,—and not for the case itself.

The court intimated to the counsel, that they should charge the jury, that these articles, under the circumstances of the case, were so far fixed to the freehold, that they would pass by the deed from Day to the defendant; and that, if the plaintiff knew of Day's putting them into the shop, in the situation described, as early as 1836, and acquiesced in their remaining there until after the sale, he would stand in no better situation, in regard to the property, than Day would, had he owned it; and that the jury might infer the ac-

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quiescence of the plaintiff from his long silence, he knowing of that use. Whereupon a verdict passed for the defendant, with leave to the plaintiff to except to the foregoing charge and to move the Supreme Court for a new trial.

J. A. Vail & W. K. Upham for plaintiff.

1. We contend that the articles in question were not so far fixed to the freehold, as that they would pass from Day to the defendant by the conveyance of April, 1843, if they had belonged to Day. The chattels were, in their nature, *personal*, and were entirely separate and distinct from the building, until used for the convenience of the book store; and they might have been used elsewhere just as well. When the building was purchased by the defendant, and at the time of the conversion, the articles could have been taken out without being injured, and without injury to the building. They were, therefore, personal property, and not a part of the freehold. *Amos & Ferrard on Fixtures*, 69, and cases there cited. *Ib.* 189. *Wetherby v. Foster*, 5 Vt. 136. *Tobias v. Francis*, 3 Vt. 425. The word *appurtenances* is usual in all conveyances of lands and buildings; and it is not understood by it that the title to personal property is conveyed. *Raymond v. White*, 7 Cow. 319.

2. If the property would pass to the defendant by the conveyance from Day, if Day had owned it, we insist it would not pass, as against the plaintiff, under the circumstances appearing in the case. As between landlord and tenant, this property, beyond all question, was personal property,—if put in by the tenant,—and might have been removed by him during his term. The fact that the articles were nailed to the building does not alter their character; they were still personal chattels, and not a part of the freehold. *Davis v. Jones*, 2 B. & Ald. 165. *Raymond v. White*, 7 Cow. 319. *Reynolds v. Shuler*, 5 Cow. 323. *Cresson et al. v. Stout*, 17 Johns. 116. *Whiting v. Brastow*, 4 Pick. 310. *Taylor v. Townsend*, 8 Mass. 411. 2 Kent 343. The plaintiff stands in a more favorable situation than Day, the defendant's grantor, because he was the lawful owner of the property, and had no interest in the land or buildings conveyed, and no knowledge of the sale. He lent the property to Day, to be used for the convenience of Day's tenants in

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the book store. The property was not fastened to the building by the plaintiff, nor had Day any authority to fasten it.

3. The fact, that the plaintiff permitted his property to remain in the building and be used by the defendant and other tenants of Day for about five years, does not amount to an abandonment of his title against the defendant. The plaintiff was neither landlord, nor tenant, heir, nor executor, but a purchaser for a valuable consideration, without notice of the sale.

Heaton & Reed for defendant.

1. In regard to the annexation of the articles in question to the building;—

1. If not freehold, and of the realty, they must at least be adjudged fixtures, as far as the manner of their annexation goes to constitute them such; *Amos & Fer.* 2; *Chit. on Cont.* 281; *Horn v. Baker*, 9 East 215.

2. By Day's conveyance of April 22, 1843, the property in these articles passed to the defendant; *Miller v. Plumb*, 6 Cow. 665. *Colegrave v. Dias Santos*, 2 B. & C. 76, [9 E. C. L. 30.] As between Day and the defendant, vendor and vendee, the rule is the same as between executor and heir; *Miller v. Plumb*, *ut sup.*; *Holmes v. Tremper*, 20 Johns. 29. A mortgage of the real estate would have conveyed these articles; *Longstaff v. Meagoe*, 2 Ad. & El. 167, [29 E. C. L. 60;] *Union Bank v. Emerson*, 15 Mass. 159. A tenant for years, even, could not have removed them after his term; *Lee v. Risdon*, 7 Taunt. 191; *Lyde v. Russell*, 1 B. & Ad. 304, [20 E. C. L. 407;] *Amos & Fer.* 87. They would have passed to a creditor by a set off of the real estate on execution; *Goddard v. Chase*, 7 Mass. 432. They could not have been sold as chattels on an execution against the grantor, Day, before his conveyance; *Winn v. Ingilby*, 5 B. & Ald. 625, [7 E. C. L. 214.] A conveyance of the fee carries with it every thing, that is not expressly reserved; 4 Kent 468; 1 Leigh's N. P. 297; 1 Sumner 492; 9 Cow. 89.

3. Fixtures, or things fixed to the freehold, until severance, are part of the freehold. *Amos & Fer.* 10, 11, 185; 6 Cow. 668. And trover for fixtures will not lie; *Longstaff v. Meagoe*, *ut sup.*

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4. Day's deed to the defendant described the premises granted, as "the land and building thereon standing, with the *appurtenances*." The building had been fitted up by Day as a book store in the spring of 1838, leased by him to Clark, as such, one year, to the defendant four years, and then sold to the defendant as a book store. It was the evident intention of the parties to sell and buy the concern, as it then stood, and as it had stood from 1838 to 1843. *Farrear et al. v. Stackpole*, 6 Greenl. 154.

5. The only objection, that can be made to these views, is, that, these articles having once been chattels severed, and the personal property of Cross, the act of no other person could divest him of this property. But it is a doctrine, as old as the Year Books, that personal property, by whomsoever annexed to the freehold, becomes realty. Brooke's Abr., Trespass, pl. 23, cited in Amos & Fer. 10; Britton, c. 33, and Bracton and Fleta, as cited in Amos & Fer. 241, n. b; *Brown v. Sax*, 7 Cow. 95. The conveyance by Day to the defendant, in the manner set forth, and without notice to the defendant of Cross's claim, as thoroughly made these articles freehold, as was any part of the building.

II. We have proceeded thus far, without the aid to the case of Cross's knowledge of and acquiescence in the acts of Day, and insist that, without these, the defendant was entitled to a verdict. But upon these points there is no error in the decision of the court.

1. Between Cross's knowledge, without objection and his acquiescence in the acts of Day we can see no difference, under the circumstances. And certainly from the first the jury had a right to infer the last. Neither can there be any difference between the legal effect of the annexation by Day with Cross's knowledge and acquiescence, and the effect of the annexation by Day himself. And if this position is correct, *Goddard v. Bolster et al.*, 6 Greenl. 427, is a case directly in point.

2. Cross, by this acquiescence, has consented to all the legal consequences of the acts of Day; and, having put it in the power of Day to convey these articles as real estate, he must now be bound by such conveyance. *Storrs v. Barker*, 6 Johns. Ch. R. 166; *Wendell v. Van Rensselaer*, 1 Ib. 354.

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The opinion of the court was delivered by

HEARD, J. There is no question made by either side, but that the articles in controversy in this suit, at the time the plaintiff became possessed of them, were personal property; but it is insisted that they became attached to the building, and passed by the deed from Day to the defendant on the 22d of April, 1843. The plaintiff purchased the articles in question in 1836, while he and Day had a mortgage upon the building, in which they then were, and took the case of drawers from the building and carried them to his store. In 1838, Day, who had then acquired the whole title to the building, carried the case of drawers back to the building and leased the building for a book store; and at this time the case of drawers was put in its original place and nailed to the wall,—but in such manner, that it might be taken away without injury to the case of drawers, or to the building; and in this situation it remained until 1843, when Day deeded the premises to the defendant;—and it appears, also, from the case, that the plaintiff was not ignorant of the disposition and use of the case of drawers.

The case was disposed of by the county court, by their informing the parties, that they should instruct the jury, that these articles were so far fixed to the freehold, that they would pass by Day's deed to the defendant; and that, if the plaintiff knew of Day's putting them into the shop, in the situation described, as early as 1838, and acquiesced in their remaining there until after the sale, he would stand in no better situation, in regard to the property, than Day would, had he owned it; and that the jury might infer the *acquiescence* of the plaintiff, in the use to which Day put the articles, from his long silence,—he knowing of that use. The argument of the case has proceeded mainly with reference to the fact, whether this property, by the use to which it had been put, had become a *fixture*.

This question about *fixtures* most frequently arises between *landlord and tenant*. As between *grantor and grantee*, it is more proper to inquire whether the *thing* was so attached to the freehold, that it will pass by the deed; and such is the case in numerous instances, when the same thing might have been taken away by the tenant. And in all these cases, the party fixing the chattel to the freehold, was, at the time, the owner of it. Such was not the fact in

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this case. The thing was originally a chattel, and the plaintiff was the owner; and there is no proof that he ever parted with his title to it, except by the act of Day, and his own acquiescence in that act. And the inquiry here is, whether that can change the ownership of the property, while the property itself preserves its identity.

It is a principle of law, in relation to this subject, that the owner may pursue his property, wherever he can trace it. But when the property has *lost its identity*, it ceases to have its legal existence;—as, if one man should convert a quantity of bricks, and erect them into a house, and then deed the house to a third person, these bricks will have lost their *identity*,—they are so changed in their character that they cease to be chattels, and the owner cannot pursue them against such third person. But in this case I apprehend there was no such change of the property, as would give it a different character. The nailing it to the building did not incorporate it into and make it a part of the building. It was merely a part of the furniture of the building, and, as the case finds, capable of being taken away without injury to the property, or to the house. No one would doubt, probably, but what the outgoing tenant would x have the right to take property similarly situated.

That, as between Day and the defendant, this property would have passed by the sale, providing Day had owned it, cannot be decisive of the question; for if so, it would apply to all sales,—as when B. sells the horse of A. to C.; as between B. and C. the title to the horse passes; but A., being the owner, may pursue the horse, notwithstanding the sale. The main question, in relation to this part of the case, is, whether the property has lost its *identity*; if it has, the plaintiff cannot pursue it; if it has not, he may pursue it into whatever hands it may have chanced to come.

The defendant relies somewhat upon the case of *Goddard v. Belster*, 6 Greenl. 427. But, in relation to that case, whatever there may be peculiar to it, the ground upon which it was put does not conflict with the plaintiff's claim in this case. That decision goes upon the ground that the plaintiff's brother, in the erection of the mill, and the putting in the mill stones and mill irons, acted but as the agent of the plaintiff; and, as the mill was on the plaintiff's land, and erected by the plaintiff's agent, which was the same as if erected by the plaintiff himself, the mill and all its attachments were

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the property of the plaintiff. No such consideration is involved in the case now before us. The plaintiff did not put the drawers into the building himself, nor was Day his agent in doing it. The plaintiff had no interest in the building, nor in the land upon which it stood. This case, then, loses all its analogy to the case cited. *Miller v. Plumb*, 6 Cow. 665, presents only the same question, that would arise, if Day claimed this property and had sued the defendant for it. *Colegrave v. Dias Santos*, 9 E. C. L. 30, is to the same effect; the question was, whether the vendor could recover of the vendee for fixtures, after having given up the possession. *Longstaff v. Meagoes*, 29 E. C. L. 60, was decided upon the authority of the case of *Colegrave v. Dias Santos*.

The conclusion, therefore, to which we come, is, that this property was not so attached to the *freehold*, as to change its character; or lose its legal existence. It once being the property of the plaintiff, it will continue to be his, until he has parted with his interest in it by his own consent, or by the operation of some law. And that presents the inquiry in relation to the other part of the charge of the court. The jury were to infer an acquiescence on the part of the plaintiff in the disposition, which Day made of the property, from his long silence.

If Cross had stood by and seen Day sell the property, without remonstrating, he would be estopped from claiming it of the purchaser; but I do not suppose that any thing is to be inferred, in a legal point of view, unfavorable to his claim, simply because he has delayed to assert his claim, unless barred by the statute. As the claim is not barred by the statute, and as the case does not find that the plaintiff ever stood by and saw Day attempt to pass over the property, without objecting, we do not see how he has, either by his own consent, or by the operation of law, parted with his interest in the property, or forfeited his right to pursue and claim his property, wherever he can find it.

Indeed, the question of acquiescence, it seems to me, has nothing to do with the case. If Day could transfer a title in the property to the defendant, it was because it had *ceased* to be a chattel interest; if that was the condition of the property, it was the attaching the property to the building, that wrought that *metamorphosis*; therefore the property became changed, and the plaintiff lost his interest

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in it, the moment the nail was driven, if he ever lost it. But we have already said that this was not such a use of the property, as was inconsistent with the nature and character of the property itself, or with the plaintiff's claim and title to it.

Judgment reversed.



**IRA DAY v. JOAB SEELY, ELISHA P. JEWETT, H. N. BAYLIES
AND CHAUNCEY L. KNAPP.**

The widow of a mortgagor is directly interested to defeat the mortgage; and she is, therefore, an incompetent witness for the defendants, in a bill brought to foreclose the mortgage, to prove that the mortgagor was insane at the time he executed the mortgage.

A court of chancery will not set aside a conveyance, which is perfectly fair, and when no undue advantage has been taken; provided the grantor had, at the time of executing the conveyance, sufficient understanding to know the nature and consequences of his act.

The burden of proof, in such case, is upon the party who seeks to avoid the conveyance.

Where it appeared that a mortgagor, at the time he executed the note and mortgage, comprehended well what he was doing and the consequences of his acts, the court of chancery held the mortgage valid, although it appeared quite probable that there had been times, previous to the execution of the mortgage, when he might not have had sufficient capacity,—the disease under which he suffered, and of which he ultimately died, being one of the brain, and one which would not, from its nature, be at all times uniform in its influence upon the understanding.

APPEAL from the court of chancery. The bill was brought to foreclose a mortgage of certain premises in Montpelier, executed by one John Parker, on the 21st of September, 1836, to secure a note for \$469.64, signed by the mortgagor and bearing date September 12, 1836. The mortgagor died in December, 1837; and the defendants claimed title to the mortgaged premises under an adminis-

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trator's sale, made, under an order from the probate court, for the payment of the debts due from the said Parker at the time of decease.

The defendants, in their answer, alleged that the said Parker, at the time he executed the note, and also at the time he executed the mortgage, was insane, and wholly incapable, by reason of his insanity and want of capacity, of making any binding contract, or of giving any valid note, or of executing a valid mortgage deed.

Among the witnesses, examined on the part of the defendants, was Hannah Parker, the widow of the mortgagor, whose testimony tended to show that her husband was in fact insane, at the time the note and mortgage were executed. A motion was made to suppress her testimony, on the ground of interest. The substance of the testimony in the case, aside from that of the widow, is sufficiently detailed in the opinion of the court.

The court of chancery found the facts alleged in the answer to be true, and dismissed the orator's bill; from which decision the orator appealed.

——— for orator.

The evidence does not show that Parker was *insane*. *Towart v. Sellis*, 5 Dowl. P. C. 231. 1 Pow. on Mort. 58, note a.

A. Spaulding for defendant.

1. It would seem from the testimony, if believed, that no one could doubt as to the insanity of Parker at the time he made the contract in question.

2. The orator objected to the testimony of Hannah Parker, because she was the widow of the mortgagor. It is contended that it does not necessarily follow that Mrs. Parker had any interest in the premises. She might have had jointure, or pecuniary provision, made for her by her husband prior to his death, or an agreement, made at the time of marriage, that she should have no dower, or no interest in the estate of her husband. The simple fact, that she is the widow, is not *prima facie* evidence of interest. The question is left in doubt,—and therefore the witness should testify. Again, it is shown in the bill and answer that these premises were sold by order of the probate court. This could not have been done

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without her consent. The presumption is, that courts act legally, and, as nothing is shown to the contrary in this case, it is to be presumed that she had other provision made for her, and that she waived her right of dower in these premises. Again, it does not appear but that Parker had other real estate, which was set off to the widow for her dower; it was not shown that she ever claimed dower in this property, and, from the lapse of time since the sale, it is to be presumed that she acquiesced in the sale. The records of the probate court settled the question, as to her interest.

The opinion of the court was delivered by

BENNETT, J. The object of this bill is to foreclose a mortgage, executed by John Parker in his life time, bearing date the 21st of September, 1836. The defendants claim title to the mortgaged premises under an administrator's sale, for the payment of the debts owing by Mr. Parker, at his decease. The right of the orator to a decree of foreclosure is resisted, upon the ground that Parker was incompetent to execute the mortgage.

The first question presented is, as to the competency of the widow of the intestate, as a witness in behalf of the defendants. If the mortgage is sustained, the widow is only entitled to dower in the equity of redemption. If the mortgage is set aside, the widow will then come in for her dower in the entire land, irrespective of the payment of the debts of the intestate. She is, then, manifestly interested in the result of this suit. Her testimony, then, must be suppressed, and the cause decided upon the other evidence in the case.

The rule is well settled, that chancery will not set aside a conveyance, which is perfectly fair, and when no undue advantage has been taken, provided the grantor had sufficient understanding to know the nature and consequences of his act; and the burden of proof, in such case, is upon the party who seeks to avoid the conveyance. We think, from a careful inspection of the whole evidence, no such degree of insanity is made out, as should render, either the note, or mortgage, absolutely void. The evidence is quite positive, that, when he executed the note and mortgage, the mortgagor did well comprehend what he was doing, and the consequences of his acts,—though it is quite probable, that there had

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been times, previously, when he might not have had sufficient capacity. We learn, that the disease, which finally prostrated the mental powers of Mr. Parker, was what is called a continuous disorganization of the brain itself. This, especially in its early stages, would not at all times be uniform in its influence upon the understanding; and even in the summer of 1837 we learn that there was a great difference of opinion among the friends of Mr. Parker, as to whether he was then a fit subject to warrant the appointment of a guardian.

It is shown positively by the orator, that this was a fair transaction on his part, and that the mortgage was given to secure a *bona fide* debt, and in pursuance of a previous agreement, made at a time, when it can hardly be claimed that Parker was incompetent. There was no oppression in the orator, and no unconscionable advantage taken of the mental weakness of the mortgagor.

On the whole, we think the decree of the chancellor should be reversed, and that the cause should be remanded to him, with instructions to decree a foreclosure in the usual form, upon the non-payment of the sum due on the mortgage, and costs, at such time as the chancellor shall order.

CASES
ARGUED AND DETERMINED
IN THE
S U P R E M E C O U R T
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA.
MARCH TERM, 1845.

PRESENT.
HON. STEPHEN ROYCE,
HON. ISAAC F. REDFIELD, } **ASSISTANT JUDGES.**
HON. WILLIAM HEBARD,

MCLEAN MARSHALL v. NEHEMIAH H. JOY.

If an attorney, having a demand entrusted to him for collection, fraudulently deceive his client in reference to the responsibility of the debtor and the value of the demand, and thereby prevail upon the client to sell to him the demand for less than the amount due upon it, and the attorney subsequently collect the whole amount of the demand, he will not be liable to refund to the debtor the amount received by him above the amount paid by him to the client; but he will be liable to the client therefor.

INDEBITATUS ASSUMPSIT for money had and received. Plea, the general issue, and trial by jury.

On trial, the plaintiff gave evidence tending to prove, that, in 1842, while the bankrupt law of 1841 was in force, he applied to the

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defendant, who was an attorney at law, in regard to making application for a discharge under that law; that, after some consultation, the plaintiff concluded to, and did, hire the defendant to buy up the demands against him at a discount, for which service he was to pay the defendant \$25,00; and that for this purpose the plaintiff made out a schedule of his creditors, which it was understood the defendant should take, and show to the principal creditors, to induce them to believe that the plaintiff was about to commence proceedings under the bankrupt law, and by this means induce them to sell their demands, or receive payment of them at a discount. The testimony also tended to show that the plaintiff was not of ability to pay all his debts.

It appeared, also, that Peter McLaughlin was one of the principal creditors,—his debt exceeding \$200; that a suit had been commenced upon this demand by the defendant, as attorney for McLaughlin, upon which he had caused the real estate of the plaintiff to be attached; that the defendant had the care of this claim, for collection; and that the defendant told the plaintiff, at the time the arrangement was made between them, that he did not know how he should get along with the McLaughlin claim, but that he thought, that, by means of the schedule, and by appearing to McLaughlin to be faithful to him, he could make him believe that he would not get much, and thus induce him to make a considerable discount on his debt. It appeared, also, that the defendant applied to McLaughlin, for the purpose of buying his demand, and represented to him that the plaintiff was about going into bankruptcy, and that the attachment would thereby be dissolved, and that he would probably get little, or nothing; that the defendant also applied to one Low, who had a demand in the same situation against the plaintiff, to assist him in buying McLaughlin's demand at a discount, saying that McLaughlin would rely upon what he, Low, should tell him, and that he, defendant, did not *believe* that the attachment would be dissolved by the application in bankruptcy, but wishing Low to represent to McLaughlin that it would be dissolved thereby; that the defendant, at this time, offered to allow Low one half of what could be saved by buying McLaughlin's claim; that Low declined entering into the arrangement, but did finally, after much importunity on the part of the defendant, consent not to expose the defendant's scheme to

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McLaughlin,—though he did subsequently advise McLaughlin not to sell his demand for less than its full amount, but did not inform him of the defendant's scheme; and that the defendant did finally, by great importunity and perseverance, induce McLaughlin to sell and assign to him his claim against the plaintiff for one hundred dollars.

It farther appeared, from the testimony, that the plaintiff sold the land attached to one Ricker, subject to the attachments of McLaughlin and Low, and left the country; and that Ricker paid both those debts in full to the defendant.

The plaintiff requested the court to charge the jury, that, though they should find that the defendant did commit a fraud on McLaughlin, in the purchase of his demand, yet, if the plaintiff did not participate in it, he might recover in this action all that the defendant received of Ricker, more than he paid McLaughlin.

But the court charged the jury, in substance, that, if the defendant purchased the demand of McLaughlin by betraying the just duty and obligation of an attorney to represent to his client the true state of his case, as he believed it to be, in the manner alluded to in the evidence, and by representing the state of his demand to be precarious and worthless, when he did not so consider it, the contract of purchase was void, and the defendant could not retain what he received of Ricker in payment of the demand, but might be compelled to pay the same to McLaughlin; and that in that case the plaintiff could not recover, whether he was conscious of the fraud, or not.

The jury returned a verdict for the defendant. Exceptions by plaintiff.

A. Underwood for plaintiff.

Farr & Leslie for defendant.

The opinion of the court was delivered by

HEBARD, J. 1. Has the defendant money in his hands, which he cannot equitably retain? That must depend upon the manner of his obtaining it. If he obtained it by fraud and misrepresentation and circumvention, he cannot retain it. And that he did thus obtain it, as against McLaughlin, there cannot, from the facts detailed in the bill of exceptions, be any doubt.

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2. Who, then, is entitled to this money,—amounting to one hundred dollars? The plaintiff owed it to McLaughlin, McLaughlin had it secured by attachment upon the plaintiff's land. This same land was sold, under an arrangement made by the defendant; and McLaughlin was induced to accept one half of his debt, in satisfaction of the whole,—which he would not have done, if he had not been imposed upon and deceived by the defendant, who was his attorney. Therefore it is, that the defendant's fraud has robbed McLaughlin, and not the plaintiff; as, if the defendant had been faithful and trustworthy to McLaughlin, he would have received his whole debt, instead of one half; so that the plaintiff is not affected by the defendant's *dishonesty*, one way, or the other.

Judgment affirmed.



ADNA C. DENISON v. ISAAC TYSON, JR.

A contract in the form of a promissory note, payable in specific articles, is treated, in this State, as a promissory note, both as to the form of declaring upon it, and as to the necessity of giving evidence as to the consideration, in the first instance, on the part of the plaintiff.

An agent, employed for the purpose of superintending the sale of stoves and hollow ware for his principal in a given section of country, and who is authorized to receive payment therefor in different articles of the produce of the country, is not authorized to execute a note, payable in such wares at a future day, and thus bind his principal by his acknowledgement of "value received."

In order to recover upon such a contract, executed by the agent, without any express authority from his principal, the contract must be declared upon specially, and the plaintiff must prove that the consideration of the note came fairly within the scope of the agent's authority, or that it came to the use of the principal.

The supreme court will not reverse a judgment *pro forma*, and remand the case to the county court, in order to enable the plaintiff to move to amend his declaration,—especially when the plaintiff had once declined taking such a course, when, in the course of the trial in the court below, it was suggested by the court as being necessary to a recovery.

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ASSUMPSIT upon a contract in writing in these words ;—" Sutton, ' March 4, 1842. For value received I promise to pay Adna C. ' Denison, or order, fifty dollars, to be paid in stoves, or hollow ' ware, as he may choose, delivered at the Tyson Furnace depot ' at Newbury, Vermont, at their wholesale prices, on demand. ' (Signed) E. K. West, Agent for Tyson Furnace, at Newbury Vt." Plea, the general issue, and trial by jury.

On trial the plaintiff gave evidence tending to prove the execution of the contract by West, that the Tyson Furnace was owned by the defendant, and that, at the date of the note in suit, Augustus Haven was the general agent of the defendant in carrying on the furnace business,—the principal centre of which was at Plymouth, Vermont ; that said Haven employed West as a sub-agent, for the purpose of making sales of stoves and hollow ware in the northeastern portion of the state,—the principal depot of wares under his control being at Newbury ; that West was authorized to sell either for cash, or other pay, or for credit, in his discretion, but was specially instructed not to give notes,—and there was no evidence that he had ever done so with the knowledge of the defendant, or of Haven ; that in one instance, when West had given a note similar in form to the one now in suit, and had received pay for the ware promised in the note, payment of the note was at first refused, but, on inquiry of the agent, and after some delay, it was finally paid ; that after West left the concern,—which was in the fall of 1842,—the defendant himself was sometimes in the state, although he resided in the city of Baltimore ; that while here, on one or two occasions, he spoke of West as being one of his most efficient agents, and a witness testified that he once heard Haven say, after West left the defendant's business, that he thought West ought never to have been allowed to give notes. Haven himself testified, in regard to the same witness' testimony, that he had no recollection of any such statement, that when West was dismissed he left the business in bad shape, that he was a very unfaithful agent, and that, if he had ever said any thing similar to that above detailed, it was this,—“ that West ought never to have given notes ; ” Haven farther stated that he never had any knowledge that West gave any notes, until about the time he was dismissed, and that he, Haven, had the entire management and control

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of the business, and the defendant took no oversight, except as he occasionally visited the state, or had information given him at Baltimore.

The plaintiff requested the court to charge the jury, that, although they might not find, that West had a general authority to give notes for money, yet that the paper offered in evidence was not of that character, as it bore upon its face intrinsic evidence of being within the scope of his authority,—it being only a bill of delivery of articles sold, for which said agent had received his pay in advance.

But the court charged the jury, in substance, that the authority delegated to West to sell stoves and hollow ware, in the manner proved, would not justify him in giving notes of the character of the one now in suit, and to bind the defendant by his acknowledgment of having received the value to his use; but that, if the plaintiff would recover upon the contract, he should declare upon it as a contract merely, and show by proof, that it come within the scope of West's agency; that, for aught that now appeared to the court, or jury, the note in question might have been given for a consideration wholly without the scope of West's agency; that if West had express authority to give such notes, or if the general scope of his authority were enlarged, so as to justify him in giving such contract, or if, such authority being exceeded by him, his acts in this respect were, by the defendant, or his general agent, recognized, in either case the plaintiff would be entitled to recover; but that, if no such authority were expressly given, either at the time of his being employed, or by subsequent extension of his discretion, or by recognition, and the general agent only paid such note, or notes, as, on inquiry and examination, he found to have been given for considerations coming within the scope of West's authority and to have come to the defendant's use, this would not be sufficient to justify a recovery on this contract, without going into its consideration.

The jury returned a verdict for the defendant. Exceptions by plaintiff.

G. C. & E. A. Cahoon for plaintiff.

I. We contend, from the facts in the case, that West had authority to give notes.

1. By implication of law, and as incident to his agency. Chit. on Cont. 212, 219. *Stowe v. Wise*, 7 Conn. 219.

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2. By recognition of his acts by his principal. Chit. on Cont. 213. 2 Stark. Ev. 57.

3. What the consideration of the note may have been is immaterial; for West was authorized to sell either for cash, or *other pay*, and to give credit in his discretion. *Proctor v. Webber*, 1 D. Ch. 371. *Roberts v. Button*, 14 Vt. 195.

II. If West had never received authority to execute promissory notes, technically speaking, still he was empowered to make contracts similar to the one in question.

1. When West was employed to sell the ware of the Tyson Furnace, he was impliedly invested with the power to bind his principal by such acts, as were necessary to render effectual the purpose of his agency. Accordingly he sold the stoves and ware specified in the writing in question, received pay for the same, and, not having the ware with him in person to be that moment delivered, gave that writing as evidence of the contract. His business being to make sales, the delivery of articles sold must, from the nature of the case, be made when and where the parties might agree.

2. Although the paper in question may have been declared on as a promissory note, that cannot change the character or nature of the paper, or of the transaction; but it is still to be regarded as evidence of the contract, and as a bill of sale of articles, then sold, to be thereafter delivered; and it is virtually a *contract* instead of an ordinary promissory note. It is similar to the contract in the case of *Roberts v. Button*, 14 Vt. 195, which, though expressed in terms resembling a note, was not, by the court, exclusively so considered.

3. It does not appear, from the facts in the case, that West was limited in the manner of effecting sales. 2 Kent 620.

4. When the defendant employed West to sell stoves and hollow wares, he was authorized to receive pay; and all who purchased of him, and paid him in good faith, are protected, notwithstanding West may have appropriated the avails to his own use. 2 Kent 620. 3 Stark. Ev. 619. *Cross et al. v. Haskins*, 13 Vt. 536. *Williams v. Mitchell*, 17 Mass. 98.

T. Bartlett for defendant.

To justify a recovery against the defendant, the plaintiff should have proved that the consideration of the note came within the

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scope of West's agency; otherwise it is, in law, the note of West, and not of Tyson. West was a sub-agent, with special and limited powers; and such a special agent cannot bind his principal, if he exceed the authority delegated to him. 2 Kent 620. *Fenn v. Harrison*, 3 T. R. 757. *Munn v. Commission Co.*, 15 Johns. 43. *Gibson v. Colt*, 7 Johns. 389. *Beals v. Allen*, 18 Johns. 362. Com. on Cont. 760. *Batty v. Carswell*, 2 Johns 48. West was a sub-agent for making sales, and the power to sign notes was expressly denied to him; when, therefore, he undertook to pledge the responsibility of Tyson, by executing the note in question, he exceeded his authority, and Tyson is not bound,—and more especially when it does not appear that there is any connection between the consideration and the business of Tyson. 2 Kent 620. *Emerson v. Providence Hat Manufacturing Co.*, 12 Mass. 237.

The opinion of the court was delivered by

REDFIELD, J. The contract, declared upon in the present action, must be treated as a promissory note, according to the decisions in this state, both as to the form of declaring upon it, and the necessity of going into proof of the consideration, in the first instance, on the part of the plaintiff. *Dewey v. Washburn*, 12 Vt. 580. *Brooks v. Page*, 1 D. Ch. 340.

In regard to the right to bind the defendant by the bare acknowledgement of "value received," the same authority is required, to execute this note, as a promissory note, in the strict sense of the terms. It is no doubt true, that, at common law, such a memorandum as this note could not, in any sense, be treated as a promissory note. It would, at most, be a mere admission in writing, and would, perhaps, *prima facie*, import the receipt of so much money to the use of the person to whom it was payable, but must be declared upon specially, and the recovery might be defeated, by showing that no money was in fact received;—so that, at common law, such a writing, unless actually given for money advanced, would be of little benefit. Hence it is true, doubtless, that no such species of contract has ever been in general use any where, except in New England. The late Mr. Justice Fletcher, of the King's Bench in Canada, when he first came into the eastern townships to preside at their trials of matters of fact, was very much annoyed by this species

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of contract, which had been imported there from this state. But, with all the energy of his brilliant talents, so deeply rooted was the practice, and of so great convenience in a country remote from market, and where commerce consisted, in a great measure, in the barter of commodities, he was at last compelled to admit, that it was not an easy thing to uproot the long established usages of business, even in a limited section of country. The worthy and learned justice of the King's Bench finally exclaimed, in *furor*, and almost in despair, that he thought it *was* asking too much, that the court should sit all day, to determine the amount of damages to be assessed upon a "*promissory note! for two middling, likely, young calves*"!! But the venerable man, the learned and eloquent judge, backed by the entire weight of the British crown, found it no small labor to convince the people of his district, that such a contract was not a "promissory note." In this state we have taken a shorter way of settling the matter, by deciding that all commodities, in which our citizens deal, shall serve as a *quasi* currency.

The jury having, in the present case, determined, under proper instructions, that the agent of the defendant, who executed this note, had no express authority to do so, and that such acts of his were not adopted by any subsequent recognition of the defendant, or of his general agent, the only remaining question is, whether any such authority is to be implied from the general scope of the business, in which the agent was employed. This, it would seem, would not be difficult of determination, if we regard the general custom of the country in reference to such agencies,—which must have been the rule, by which the agent would be expected to govern himself, and so must be esteemed an important qualification of the contract of agency.

The agent was employed, as a sub-agent, to dispose of wares in a portion of the state. He was employed to *sell*,—not to *purchase* other property, nor to raise money on the credit of the defendant, even if the payment should ultimately be made in stoves,—much less would he be supposed to have authority to execute promissory notes on the part of the defendant. All this might properly fall within the scope of the general agency of Haven; and if West made contracts of this kind, and proposed to bind the defendant by such a note, when he was expressly forbidden to do so, there could be no

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doubt, so far as he was concerned, that he acted beyond the scope of his authority, unless he had express permission from Haven, or the defendant. And to us it seems there was nothing in the nature of West's employment, calculated to induce others to believe that he had any authority to bind the defendant by such a contract as the present.

This contract, so far as the "value received" is implied from its terms, is the mere *admission* of the agent. The admission of an agent will never bind the principal, except in connection with some act, which he is authorized to do. And in the present case, unless he had authority to execute such contracts, there is *no act* of the agent shown. This admission, then, is a naked admission of the agent, and, for aught that appears in this case, might have been for his own debt, or wholly without any consideration. We think the case of this agent not very different from that of any pedler, employed to sell goods and take pay in other commodities,—or that of a mere clerk in a store, when the principal, or his general agent, is where he may be consulted. In such case it would hardly be pretended that the pedler, or the clerk, could bind the principal by such a contract as the present. If that could be done, then such an agent could bind the principal to any extent in amount, and payable an indefinite time in advance. This would be putting it in the power of clerks and pedlers, employed to sell goods merely, very materially to extend the business of their principals.

In such cases we think the person, who takes the contract of the agent in such a form, should be required to show that the consideration paid came either fairly within the scope of the agency, or that it in fact came to the use of the defendant, if he would recover the amount of him. Such is the doctrine of the case of *Emerson v. The Providence Hat Manufacturing Co.*, 12 Mass. 237. That case is almost precisely in point, as an authority for the present determination. The result is, that judgment must be affirmed.

The counsel for the plaintiff moved the court to reverse the judgment *pro forma*, and remand the case, in order to allow an opportunity to apply to the county court for leave to amend the declaration.

THE COURT decided that they could not listen to such an application in the present stage of the case,—and especially as it ap-

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peared that such a course had been suggested to the counsel by the court below, which was at the time declined, the counsel choosing to abide the decision of this court, rather than submit to terms for such an amendment, and the consequent necessity of adducing proof of the consideration of the contract.



BENJAMIN F. ANDRUS AND WIFE v. JONATHAN FOSTER.

Where a daughter continues to reside in the family of her father after the age of majority, the same as before, the law implies no obligation on the part of the father to pay for her services.

And the same rule applies to cases where the person, from whom the compensation for services is claimed, took the plaintiff into his family, when she was a child, to live with him until she should become of age, and she continues, after that time, to reside in his family, he standing *in loco parentis* to her.

If she claim pay, it is incumbent upon her to show that the services were performed under such circumstances, as to justify an expectation on the part of both that pecuniary compensation would be required.

The right to compensation for services, in such cases, must depend upon the circumstances of each particular case.

In this case the plaintiff, being the niece of the defendant, and taken by him, when she was a child, to live with him until she should become of age, was told by him, when she arrived of age, that she was free to go, if she chose, but that, "if she remained and did well, he would do well by her," and she thereupon continued to reside with him for about six years, as a member of the family, and was uniformly treated as she was before she became of age, neither party keeping any accounts. The plaintiff then left the defendant and went to New Hampshire, and continued to reside there, without any expectation of returning, for about five years, when, at the request of the defendant, she returned and worked for him, and in his family, for about a year. And it was held that she was not entitled to recover compensation for her services during the time, which elapsed after she became of age, and before she went to New Hampshire,—but that she was entitled to pay for her services rendered for the defendant after she returned from New Hampshire.

If the husband and wife are both parties to an action on book account, the wife is a competent witness on the trial before the auditor.

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IN THIS CASE the whole matter in controversy was tried upon a declaration in offset filed by the defendant. Judgment to account was rendered, and an auditor was appointed, who reported, in substance, as follows.

In 1821 the defendant, being childless, took the plaintiff's wife, then Susan Sanderson, who was then about eight or nine years of age, and who was a niece of his wife, to live with him, until she should become of age. She continued to reside in his family until she became eighteen years of age, when he informed her that she was free to go,—but told her, that, “if she remained with him, and did well, he would do well by her.” Thereupon, being destitute of a home, she consented to stay with him, and worked for him as before, living in the family, as a member of it, and attended school some, and was uniformly treated as she was before she became eighteen years of age; and during this time neither party kept any accounts against the other,—nor were any accounts made up between them until after the commencement of this suit. She continued thus to reside in the defendant's family, and worked for him, with but slight interruptions, and without any specified contract for her work, until about the year 1836, when she left and went to New Hampshire. At the time she left there was no settlement made between her and the defendant relative to her labor, nor was there any talk of pay, or settlement, between them, and she did not then expect again to return and reside in his family. While she continued to reside in the family of the defendant, who was a farmer, she was able to do as much of most kinds of work, ordinarily carried on in a farmer's family, as girls in general. She continued to reside in New Hampshire until February, 1841, when at the request of the defendant, she returned, and worked for him, and in his family, until about three weeks before her intermarriage with the plaintiff Andrus,—which took place January 12, 1842.

On the hearing before the auditor the defendant objected to the competency of the plaintiff's wife as a witness; but, she being a party of record in the action, the objection was overruled and her testimony received.

The auditor reported that the labor of the plaintiff's wife for the defendant, after she returned from New Hampshire, as above stated, amounted, with the interest, to \$42.75. It farther appeared that the

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defendant delivered to her, at the time she was married, and during the summer previous, various articles, including thirty dollars in money, amounting in the whole, as allowed by the auditor, to the sum of \$108.14; but the auditor reported that only thirty dollars of that sum was delivered in payment for her labor during that season, amounting, with the interest, to \$34.20, and leaving a balance due to her, for that season's work, of \$8.55. The auditor farther reported, that, if the defendant was liable to pay the plaintiff's wife for her services rendered subsequent to her becoming eighteen years of age, and before she went to New Hampshire to reside, there was due to the plaintiff, after deducting the whole of the above mentioned sum of \$108.14, the sum of \$103.67.

——— for plaintiffs.

I. Was the plaintiff Susan properly admitted to testify? The statute, Rev. St. 220, § 6,—settles this point as decided by the auditor.

II. Is there not evidence of a contract, sufficient to entitle the plaintiffs to judgment upon the report?

1. The fact that the defendant told Susan, that, if she remained with him and did well, he would *do well by her*, raises the presumption that he should pay her what she earned. Chit. on Cont. 544. *Jewry v. Busk*, 5 Taunt. 302. *Bryan v. Flight*, 5 M. & W. 116. *United States v. McDaniel*, 7 Pet. R. 1. *United States v. Ripley*, 7 Pet. 18. *United States v. Fillebrown*, 7 Pet. 28. *Newell v. Ex'r of Keith*, 11 Vt. 214.

2. The burden of proof is upon the defendant, to show that the services were performed without a view to a compensation; for it is a well established principle of law, that, when the services have been performed, the law *implies* a promise, unless the defendant shows that they were performed without a view to such compensation. Chit. on Cont. 541. *Livingston v. Ackerton*, 5 Cow. 531. *Jacobson v. LeGrange*, 3 Johns. 199. *Bartholomew v. Jackson*, 20 Johns. 28. 9 Cow. 647. *James v. Bizby et al.*, 11 Mass. 37—40. *LeSage v. Coussmaker*, 1 Esp. R. 187. *Farmington Academy v. Allen*, 14 Mass. 174. *Guild v. Guild*, 15 Pick. 129. *Osborn v. Governors of Guy's Hospital*, Str. 728. *Little v. Dawson*, 4 Dall. 111. *Lamb v. Bunce*, 4 M. & S. 275.

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3. If the services were rendered without a view to a compensation, it was a matter of fact for the auditor to find from the evidence before him; and it is not competent for the court to presume a fact from certain other facts found in the report. *Newel v. Ex'r of Keith*, 11 Vt. 214. *Phelps et al. v. Wood*, 9 Vt. 399. *Paige v. Ripley*, 12 Vt. 289. *Swift v. Raymond*, 11 Vt. 317. *Brown v. Kimball*, 12 Vt. 617. *Stoddard v. Chapin*, 15 Vt. 443.

4. It is denied, that the facts detailed by the auditor authorize the presumption, even, that the services were performed without a view to reward in the nature of a debt.

III. The plaintiffs are, at all events, entitled to recover the balance due for the last year's service.

J. R. Skinner & L. B. Peck for defendant.

Foster stood in *loco parentis* to Andrus' wife, and the plaintiffs ought not to recover, unless it was the understanding of both parties that the services were to be paid for. She continued to live with Foster, after she became of age, as a daughter, having no other home, and not expecting to claim pay for her services. She was clothed, sent to school, and treated in all respects as a father, when of sufficient ability, treats his daughter. It is evident, from the situation of the parties, and the circumstances of the case, that neither party supposed there was to be a claim for wages. The work on one side, and the support and clothing furnished on the other, was a voluntary courtesy, which creates no implied *assumpsit*. The labor performed by Mrs. Andrus, after her return from New Hampshire, stands upon the same footing as her previous work. The situation of the parties was the same, and it must have been so regarded by them. Quite a large proportion of the defendant's account accrued for articles furnished after her return and in contemplation of marriage. The intercourse and dealings between the parties were like that between parent and child; and to make the defendant responsible will be setting a precedent which will lead to litigation and greatly tend to disturb the quiet and peace of families.

The rule, as applicable to cases of this character, was correctly laid down in *Candor's* case (5 Watts & Serg. 513.) It is there held that a child is not entitled to recover wages, for services rendered, from the estate of his deceased parent, unless upon clear and

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unequivocal proof, leaving no doubt that the relation between the parties was not the ordinary one of parent and child, but of master and servant. The right to recover in such case ought not to be permitted to rest on an implied promise. If the daughter will seek a recovery against her father for services, she ought to show *affirmatively* that payment was contemplated in the outset. *Wier v. Wier's Adm'r*, 3 B. Monroe 647. *Fitch v. Peckham, Ex'rx*, 16 Vt. 150. *Alfred v. Fitzjames*, 3 Esp. Cas. 3. Law Magazine, No. 5, Apr. 1844, 166.

The opinion of the court was delivered by

REDFIELD, J. The important question in this case is, whether a child, or foster-child, remaining at the house of its parent, after the age of majority, and making that a home, the same as before, and assisting in the household labors, (the child being a daughter,) is entitled to a pecuniary compensation for her labor, the same as a stranger. We think it difficult to lay down any general rule upon the subject. Every case will be more or less affected by its own peculiar circumstances. The amount and kind of labor, the ability and necessity of the parent, the course of dealing between the parties, whether they keep accounts or not, whether the demand for compensation is made early, or is delayed for many years after the relation began, or, as in the present case, after it terminated, these, and many similar circumstances, will be significant indications of the expectation of the parties, at the time of the relation subsisting, which should determine their rights. The matter is, perhaps, as well summed up by Chief Justice Shaw, in *Guild v. Guild*, 15 Pick. 129, as it can be. "Such a continued residence of a daughter may, indeed must, be regarded under one of these three aspects; She may be a servant, or housekeeper, expecting pecuniary compensation for services, or she may be a boarder; expecting to pay pecuniary compensation for accommodations and subsistence; or she may be a visiter, expecting neither to make, nor pay compensation. Perhaps it might be safe to consider the latter predicament as embracing the larger number of cases."

This would lead us to the same conclusion to which the court came in the case of *Fitch v. Peckham's Executrix*, 16 Vt. 150. The rule there laid down by the chief justice is, that the law in

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such cases will not ordinarily imply a promise on the part of the parent to make pecuniary compensation for the child's labor; or on the part of the child to make such compensation for her board. If the child, in such circumstances, being suit for pay, it is incumbent upon her to show, that, at the time, it was expected by both parties that she should receive such compensation, or that the circumstances, under which the services were performed, were such, that such expectation was reasonable and natural.

In fact, I apprehend the circumstances of each case will usually remove all doubt of the expectation of the parties at the time. In the present case the plaintiff's wife had been brought up from a child by the defendant. At the time she became of age the defendant told her she was free to leave him, if she chose; if she remained with him, and did well, he would do well by her. This was in 1829, or 1830, and she continued to reside with defendant until 1836, and labored most of the time. "She lived in the family, as a member of it, and was uniformly treated as before she became of age." Neither party kept any account against the other; the plaintiff's wife had what she needed for her support, as before, and when she left, neither party expected her to return, to reside any more with defendant. No settlement was made, and no claim for compensation made, until after the intermarriage of the plaintiffs, 12th January, 1842. About the first of February, 1841, she returned to live with the defendant *at his request*, and worked for him until about three weeks before her marriage. During this time the auditor estimates her services at \$37.50, and reports that the defendant furnished her with money and other things, such as she needed for housekeeping, to the amount of \$108.14. The auditor farther reports, that \$30 only of this last sum was paid to go towards the last term of labor, which would leave a balance in the plaintiff's favor, upon the last service, of \$3.55, including interest.

In regard to the first term of service, or residence, after the plaintiff's wife became of age, it is very obvious that neither party expected she was to receive any other pecuniary compensation, than what defendant's generosity might prompt him to give. But in regard to the latter, it seems different. There is nothing which would induce us to doubt, that compensation was expected. The only wonder is, that, when the defendant delivered \$108 during that

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term, he should not have first paid his debt, and left the balance to go upon the score of gratuity, or generosity. Men are very likely to meet their debts first, and then discharge the more *imperfect obligations*. And it would seem that the auditor may have arbitrarily applied one certain item of \$30 (money) towards the last services, upon the mere supposition that that would best meet the moral equity of the case. Be that as it may, it is his province to decide the facts; and, as they stand, the plaintiffs are entitled to judgment for the sum of \$8.55. From the abstract in the Law Magazine, No. 5, April, 1844, p. 166, it seems that the Supreme Court of Pennsylvania have recently had this subject under consideration, and have come to the same determination as here made, which, in every view of the case, seems most just and reasonable.

Judgment of the county court reversed, and judgment for the plaintiffs for \$8.55.



DANIEL MCGREGOR v. BARNABAS D. BALCH AND LUTHER CHICKERING.

The omission of one or more joint obligors, in actions *ex contractu*, can only be taken advantage of by plea in abatement, unless the fact that such parties were joint contractors appear of record in the very suit on trial,—in which case the omission may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error.

The rule is the same in regard to the omission of a joint contractor in suits founded upon record contracts,—such as recognizances,—unless the defendants crave oyer of the record and have it spread upon the record of the pending suit. If that be done, the defect, appearing upon the face of the pleadings, may be taken advantage of by demurrer, &c.

Quære, Whether, if seven years from the time of entering into the contract have not elapsed, it will not be presumed that the omitted obligors are living?

If a person, who is known equally by the name of Barnabas and Barney, enter into a recognizance by one name, and be sued by the other, the variance will not be considered fatal,—the one being but an abbreviation of the other.

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A justice's record of a recognizance, taken for the prosecution of an appeal, that the cosurers "jointly and severally recognized in the sum of one hundred dollars for the prosecution of the appeal in due form of law," is well enough, and is competent evidence under a declaration, which alleges that the condition of the recognizance was, that the appellants "should prosecute their said appeal to effect, and answer and pay all intervening damages, occasioned by delay to the said plaintiff, with additional costs, if judgment be affirmed."

In estimating "intervening damages," in such case, the property which the appellant had at the time the appeal was taken and all that he acquired during the pendency of the appeal is to be taken into the account. The plaintiff is entitled to recover the value of his *chance* of collecting his debt during the time of the suspension of his execution.

SCIRE FACIAS upon a recognizance in the sum of one hundred dollars, entered into by the defendants, on the 22d day of January, 1840, before Calvin Morrill, Esq., a justice of the peace, on an appeal being taken by Coben Balch and Coben Balch, Jr., from a judgment rendered against them by said justice in an action in favor of the present plaintiff against them. The declaration described a recognizance entered into by the present defendants only, and alleged that the condition of said recognizance was, "that the 'said Coben Balch and Coben Balch, Jr., should prosecute their 'said appeal to effect, and answer and pay all intervening damages 'occasioned by delay to the said Daniel McGregor, with additional 'costs, if judgment be affirmed."

The defendants pleaded *nul tiel record*, and also a tender of \$36.50 in satisfaction of all additional costs and intervening damages occasioned by said appeal. Replication, that the tender was not of sufficient amount.

On trial the plaintiff gave in evidence the record of the recovery by him in the said suit against Coben Balch and Coben Balch, Jr., and also a record of the recognizance upon which this suit is predicated,—which was in these words; "The defendants, as principal, 'and Barney D. Balch and Luther Chickering, as surety, recognized to the plaintiff in the sum of one hundred dollars, for the 'prosecution of the said appeal in due form of law." To the admission of this evidence the defendants objected, as not supporting the declaration. But the court overruled the objection and admitted the evidence.

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The plaintiff then introduced testimony tending to prove that after the time said appeal was taken, and during a period of about two years and five months, while said appeal was pending, the said Coben Balch and Coben Balch, Jr., were the owners of property to a considerable amount, on which the plaintiff might have levied his execution, if he had had one,—but that, at the time the plaintiff recovered his final judgment against the said Coben Balch and Coben Balch, Jr., they were utterly insolvent and destitute of all attachable property.

Upon this evidence the defendants requested the court to charge the jury, that, if they should find that the said Coben Balch and Coben Balch, Jr., were not, at the time of taking said appeal, the owners of any attachable property, the defendants were not liable on their recognizance, although it should appear, that, pending said appeal, said Coben and Coben, Jr., did acquire and own attachable property.

But the court instructed the jury, that, if the said Coben Balch and Coben Balch Jr., pending said appeal, did own attachable property, although acquired by them subsequent to said appeal, and if it appeared that they would have had such property, if the plaintiff had taken execution at the time of the appeal, and that the plaintiff, by the exercise of common diligence, might have levied his execution, in case he had one, upon said property, then the defendants would be liable, upon their recognizance, for such sum as the plaintiff had suffered damages by reason of not having an opportunity to levy upon such property in consequence of said appeal;—that the plaintiff should recover the value to him of the *chance* of which he had thus been deprived by the appeal.

The jury returned a verdict for the plaintiff. Exceptions by defendants.

Colby and Caboon for defendants.

1. The record offered should not have been received in support of the declaration, on account of variance, as it did not conform, in any respect, with the recital in the declaration. *Waldo et al. v. Spencer*, 4 Conn. 71. 4 B. & C. 403, [10 E. C. L. 370.]

2. The record exhibited shows a mere minute, or memorandum, of a recognizance,—not a recognizance in form, or substance. It

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does not correspond with any recognizance which the statute authorizes, and is therefore a nullity. 1 Chit. Pl. 371. *Story v. Kimball*, 6 Vt. 544. *Billings et al. v. Avery*, 7 Conn. 296. *Darling v. Hubbell et al.*, 9 Conn. 350. *Treasurer v. Woodward*, 7 Vt. 531. 1 Saund. R. 66.

3. The recognizance, as proved, involves no liability, or no such liability as was attached to it in the construction adopted by the county court.

4. But the county court treated the terms of the recognizance, produced in evidence, as equivalent in substance, and with the aid of some intendment, to the one authorized by statute. But it should appear affirmatively that the magistrate acted within the scope of his authority; this is given exclusively by statute, and it can only appear from the record of the magistrate whether such a recognizance, as is required by law, was taken.

5. The debt can be recovered on the recognizance only upon the plaintiff's showing the appellant to have been good at the time of the appeal and bad at the time of final judgment. *Marrocks J.*, in *Love v. Estes et al.*, 6 Vt. 289. But the county court held the bail liable for property acquired by the principal subsequent to the appeal, and the jury were instructed to find for the plaintiff the value of his chance of levying his execution, of which he was deprived by the appeal; and to determine the value of this chance they were directed to inquire,—1, If the principals, pending the appeal, had property, which was acquired by them subsequent thereto;—2, Whether the principals would have had said property, in case no appeal had been taken;—3, Whether the plaintiff, by the exercise of ordinary diligence, might have levied his execution thereon. Now it is apparent that the jury never could find the fact sought for in the second inquiry, because it is a fact not possible to be known. It is conceded, that, at the entry of the appeal, the principals had nothing which could be reached by execution; but, it being out of the power of the plaintiff to have execution, the principals subsequently acquire some property liable to attachment;—but surely it is impossible to perceive whether they would, or would not, have thus acquired property, if an execution could have been levied.

What, then, are to be deemed intervening damages, within the

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terms of the recognizance? The plain and simple inference is, that the plaintiff's means of levying and collecting his execution be kept as good until final judgment as at the time of the appeal. Property acquired subsequently should be regarded only when accompanied with proof that the principal had the resources at the time of the appeal, out of which it is created. Any other rule of construction would make the bail not only insurers, but insurers against contingencies not possible to be controlled.

D. Hibbard, Jr., and T. Bartlett for plaintiff.

1. If the defendants would have taken advantage of the non-joinder of Coben Balch and Coben Balch, Jr., they should have pleaded in abatement; the omission to join them in the action cannot avail the defendants on trial, as matter of variance. 1 Chit. Pl. 29-33, 442. 1 Saund. R. 284, 291, note 4. *Ruggles v. Patten*, 8 Mass. 480. *Converse v. Symms*, 10 Mass. 377. *Holmes v. Marden*, 12 Pick. 169. *Wilson v. Nevers*, 20 Pick. 20. *Nash v. Skinner*, 12 Vt. 219. *Ives v. Hulet*, 12 Vt. 314. 2 Stark. Ev. 551.

2. The record of the recognizance substantially supports the declaration. *King v. Pippet*, 1 T. R. 235. *Drewrey v. Twiss*, 4 T. R. 558. *Peppin v. Solomons*, 5 T. R. 496. The declaration is drawn in conformity to the statute, and sets out a recognizance in due form. Rev. St. 174, § 47. *Way v. Swift*, 12 Vt. 390. The record sent up is not so formal as would suit the eye of a critical lawyer; but it resembles many of the records that are made by justices of the peace; and, in the language of Ch. J. Williams, in the case of *Story v. Kimball*, 6 Vt. 541, "we must not too strictly, or severely, examine their forms of proceeding in making up their records."

3. Intervening damages mean damages happening between two events,—that is, between the appeal and the affirmance of judgment. Not only present property but future acquisitions are liable for the payment of present existing debts. If, when the defendants took their appeal, the property which they then had in possession was the only property to which the plaintiff had a right to look for payment, and future acquisitions were not liable, then there would be much force in the argument, that the plaintiff has sustained no intervening damages. But inasmuch as property, which the debtors might acquire subsequent to the recovery before the justice, would

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be liable to seizure and sale, we see no reason why the bail should not be responsible for intervening damages, to the amount which the plaintiff could reasonably have been expected to collect of them during the delay, provided he could have had an execution.

The opinion of the court was delivered by

REDFIELD, J. 1. It is urged that the non-joinder of all the parties to the recognizance, in this case, is a fatal variance, which might be taken advantage of, upon trial, upon the plea of *nul tiel record*. But we think not. The rule and the reason for it seem to us to be the same, whether the declaration be upon a contract of record, or upon any other written contract,—as for example, a bill, note, or bond. And in all these cases it is well settled that the omission of a joint contractor can only be taken advantage of by plea in abatement, unless such omission appear upon the record, that is, *the record of the very suit upon trial*; and in that case it may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error. 1 Chit. Pl. 32. And in the present case, if the defendants had craved oyer of the record declared upon, and, after setting it out, had demurred, the defect complained of, appearing of record, must have been fatal. It is said, in some of the books, that it must appear of record, that the joint contractor omitted is *still living*, in order to take advantage of the non-joinder by demurrer, &c.; but this, I apprehend, is to be presumed, for at least seven years, unless the contrary appear.

2. The variance of the record from the declaration, in the name of one of the defendants, would once, doubtless, have been held fatal. But when there is no controversy but that Barney, Barna. and Barnabas are used for the same name,—as are Benja., Ben., Benje and Benjamin,—and it appears that the objection has not been started, until the final argument in this court,—showing that this defendant is known and called by the name of Barney, as well as Barnabas,—the court would consider the defeating of the suit, upon so trivial an objection, as savoring more of minute criticism, than either of wisdom, or justice.

3. It is urged, that the record of the recognizance is so defective in form, that it should have been held void. It is not pretended that it contains more than the statute obligation,—which *would*

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make it void,—but that it contains so much less, that the court cannot say that the conusors intended to assume the statute obligation. This is certainly necessary, in order to make the contract binding. We do not understand, that, in the present case, there is a want of a formal record, as was the case in *Story v. Kimball*, 6 Vt. 344 ; but the form of the record is here defective. But we think not fatally so. No particular form of words is requisite, in order to the validity of a record. It should appear from the record, or from reasonable intendment, that the defendants entered into the statute recognizance to prosecute the appeal. The obligation of every such recognizance is *conditional*;—so that is implied. The law fixes the nature and extent of the condition;—so that may be as well expressed as it is here, as to be written out in the form of the statute then in force, of which the court will take judicial notice.

We cannot and ought not to disregard the consideration of the nature of justice courts, the great number of them, the extent of their jurisdiction, and the fact that most of them are holden by men not professionally educated. If their records express, in general terms, the nature of their judgments, and their recognizances are so expressed as to enable this court, on the most favorable construction, to comprehend the nature and extent of the obligation intended to be assumed by the conusors, we should not be acting a reasonable part to require more. Upon this rule of construction there is no difficulty in supporting the present recognizance. For the names of the conusors, the sum in which they are bound and that they are jointly and severally bound does appear upon the record, and that it was “for the prosecution of the appeal in due form of law.” This implies, that, in case of failure, they are to pay all intervening damages and additional costs. The law imposes this specific condition, and it is as well, perhaps, to express it, “in due form of law,” as to write out the terms of the contract.

4. The rule of damages laid down by the county court was correct. “Intervening damages” are such as will make the party as well off, as if no appeal had been taken. This can only be determined by looking at the appellant’s property from the time of the appeal until the final judgment ; and it is, as was said by the court in *Rogers v. Judd*, 5 Vt. 236, the value of the plaintiff’s “*chance*” of collecting his debt during the suspension of his execution, which

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he has lost by the appeal, and which he is entitled to recover by way of damages. What was said to the jury, as to the mode of estimating this chance, was not necessary,—for that rested exclusively with the jury, and might have been left with them without comment. We do not now perceive, however, any way, in which what was said upon this point could have misled the jury, or that it was not, in fact, just and reasonable; but it pertained, doubtless, more to the province of the jury, than any matter of law, and was well enough, if the jury did not except to it; and if they did, they were at liberty to disregard it.

Judgment affirmed.



PATRICK CARROLL, FRANCIS CARROLL AND LEWIS LANE, *qui tam*,
v. EDWARD ALDRICH.

Several creditors, having distinct and separate debts due to them severally from the same debtor, cannot join as plaintiffs in an action *qui tam* against such debtor, to recover the penalty given by statute for being party to a fraudulent conveyance, or judgment.

THIS was an action brought to recover the penalty, given by statute, for being party to a fraudulent conveyance by one Thomas Gibbs, a debtor of the plaintiffs, and of procuring, against the said Gibbs, a fraudulent judgment, with the intent thereby to enable the said Gibbs to avoid the debts due from him to the plaintiffs. It appeared, from the declaration, that the debts due from Gibbs to the plaintiffs were not due to them jointly, but that they were distinct debts, due to the plaintiffs severally; and for this cause the defendant demurred specially to the declaration.

The county court adjudged the declaration insufficient, and rendered judgment for the defendant; to which decision the plaintiffs excepted.

G. C. & E. A. Cahoon for plaintiffs.

Although it may not appear that the plaintiffs were partners, or

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jointly interested in the debts sought to be avoided by the defendant, it would still seem that they ought to be permitted to sustain this action, for the reason that the defendant is liable to but *one penalty*; by consequence, if the creditors are compelled to sue singly, *one only* can obtain the penalty given by statute, leaving the remainder wholly without remedy. In *Forbes et al. v. Davison*, 11 Vt. 660, the court say, "The effect is the same to the defendant, whether sued by *all, jointly*, or by one alone, as but one penalty can be collected."

"Each of the fraudulent parties to a conveyance is liable to the penalty of the statute;" See *Slack v Gibbs*, 14 Vt. 366; but the defendant does not seem to be liable to each individual creditor in a separate penalty, as he should be, if this demurrer prevails. "Though the interests be several, yet, if the injury occasion an *entire joint damage* to several, they may join." 1 Chit. Pl. 54. "If two persons have an *entire joint damage*, they may bring a joint action, though their *interests* are several." *Coryton v. Lithebye*, 2 Saund. R. 115, & note. It seems to us, that the case at bar falls within the above rule. The fraudulent transaction of the defendant, notwithstanding the several interests of the plaintiff, operate as a *joint damage* to all, and was made with intent to avoid their claims, as a whole.

The statute gives the forfeiture equally to the *county* and the *party aggrieved*. Now, who is the *party aggrieved*? Not, surely, *one creditor only*, or he who might first commence an action, but *all*, whose debts or rights are sought to be avoided. A different construction, or such as the defendant now seeks to apply, would render the statute *partial, unequal and unjust*. The rights of *all* creditors should receive *equal* protection. Of two constructions, then, one producing but *partial and proximate*, while the other affords *equal and unrestricted*, if not *complete*, justice and equity, the latter, so long as legislation professes to act for the *community*, as a whole, should prevail.

D. Hibbard, Jr., for defendant.

If the legal interest of two, or more, be several, and there be no express contract with all, they must sue separately. 1 Chit. Pl. 8. *Forbes et al v. Davison*, 11 Vt. 672. The statute gives this action

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to the *party* aggrieved, not to the *parties*; and the party that sues first is entitled to the penalty. In 4 T. R. 22, BULLER, J., said, there was no instance, in which the court had given leave to amend *as to parties* in the suit, in a *qui tam* action, after a *demurrer*. A joint action against the fraudulent grantor and grantee, to recover the penalty, cannot be maintained; and, if both are joined as defendants, and a verdict is obtained against them, judgment will be arrested. *Slack v. t. v. Gibbs et al.*, 14 Vt. 357.

The opinion of the court was delivered by

HEBARD, J. The only question, in relation to the sufficiency of the declaration, grows out of the joinder of the several plaintiffs. It does not appear that the plaintiffs were in any way connected in business, or that they had any joint interest in the several debts, which, they allege, the defendant attempted to avoid by this fraudulent conveyance. But the declaration alleges, that the sale was made to avoid those particular creditors, and their debts; and it is therefore claimed that the injury was joint.

To determine the propriety, or impropriety, of the joinder of the plaintiffs, it will be necessary to consider the nature of the claim, and the defendant's liability. The action, in the first place, is provided by statute, to recover a *penalty*. The penalty belongs only to those persons, to whom it is given by law,—and that, not by way of satisfying and discharging a debt, but by way of *correction*. Ordinarily, all, who *may* join as plaintiffs, *must* join; and it would seem, here, that, if more than one of the creditors of the fraudulent vendor may join as plaintiffs, all *may* and *must* join. The statute gives the action to the party aggrieved;—one creditor is, in contemplation of law, as much aggrieved, as another. The statute gives one half of the penalty to the first who will prosecute; and to determine this, the magistrate, or clerk, is to certify the true day of signing;—the phraseology of the statute seems to imply this view of it,—whether accidental is uncertain. The nineteenth section (Rev. St. 432) provides that all such fraudulent sales shall be null and void, as against the *party*, or *parties*, whose debt is attempted to be avoided. The twentieth section provides, that the parties to such fraudulent conveyance shall forfeit the value of such property, which forfeiture shall be equally divided between the party aggrieved and the county.

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There is, therefore, no *joint injury*, or *joint interest*. It is no common law cause of action, founded upon a *liability* created by contract, express, or implied, nor growing out of any liability incurred by a direct violation of any individual's right by any tortious act. It is a cause of action given by statute by way of punishment, and no one has any concern or interest in it, any farther than such interest is created by statute. It is, therefore, unlike the case for not grinding at the plaintiff's mill, and the case of the *Dippers at Tunbridge Wells*, which have been cited by the counsel for the plaintiffs.

The statute of 1787, from which all the subsequent statutes have derived their general provisions and expressions, in this respect, makes no provision for collecting the forfeiture. It creates a forfeiture of the property, and, upon conviction, imposes a punishment by confinement for half a year, and provides for an equal division of the forfeiture between the county and the party *grieved*, but makes no provision for collecting it,—unless, as is probable, by other general provisions of the law, it would be in the criminal form of proceeding by information, or indictment, and the aggrieved party would act as a common informer, to set the law in motion. By the statute of 1797 and the statute of 1821 the general provisions are retained, with some modifications, but the mode of recovering the penalty is provided for by action on the case, founded on this statute, one half of the penalty to be paid to the party aggrieved, and the other half to the county; and the same provision is retained in the Revised Statutes.

In law, the fraudulent sale is made for the purpose of avoiding all the creditors, and one creditor can sue, as well as another. If, therefore, any *particular* creditor has any legal interest in the penalty, all have, and all should join in prosecuting it. But the reverse is the fact; no one has any *interest* in it. The sale being made fraudulent, only as against creditors, therefore, if no one of the creditors complains, the public are not injured; and, the penalty being imposed by way of punishment, the statute has designated the particular mode of setting the law in motion, and that is by a creditor's instituting a suit,—so that he, *pro hac vice*, becomes an informing officer; and because there is another person, who might as well have done it as the person that first moved, it does not fol-

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low that two, or more, either *must*, or *may* join; for it might as well be said, that all the town grand jurors must join in a complaint for an offence against some criminal law, because, by law, one has as much authority as another to prosecute it.

Judgment affirmed.



STATE v. JOHN BUCHANAN, N. H. JOY, JONATHAN WELCH, BRADLEY MORRISON, GEORGE WELCH, JOHN H. DUSTIN AND HORRA WELCH, 2d.

If one, specially deputed to serve a writ of attachment, be about to make service of the process by attaching thereon, as the property of the defendant, property which belongs to a third person, and in which the defendant has no attachable interest, it will not be lawful for the real owner of the property to resist the making of such attachment.

And if resistance be made to such attachment, the persons resisting will not be allowed, on trial of an indictment against them therefor, to prove, in defence, that the process, upon which the attachment was about being made, was sued out by connivance of the plaintiff and defendant therein and of the officer, and was intended to be used by them for the purpose of placing the property attached, which belonged to one of the respondents, in the hands of insolvent and irresponsible persons, so as to deprive the owner of his property, or fraudulently compel him to pay money in order to regain the possession of it.

INDICTMENT for an assault and battery upon the person of one John D. Whitehill.

On trial evidence was given, upon the part of the prosecution, tending to prove that certain writs of attachment, in favor of Jonathan Darling against one Charles Davis, were put into the hands of the said Whitehill to serve and return,—he being an indifferent person, and specially authorized to serve the said writs by the justice signing the same; that Whitehill entered a store in Groton, formerly occupied by the said Charles Davis, and, by direction of the said Darling, attached the goods in said store as the property of said Davis, and commenced making an inventory thereof,—the respondent Buchanan being present as an assistant; that, after Whitehill

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had been so in possession of the store and goods for some hours, the said Buchanan took the key of the store door,—the door being locked,—saying that he took possession, and opened the door, and invited the other respondents to come in; that Whitehill attempted to prevent this proceeding,—but the respondents overpowered him, and forcibly put him out of the store,—using, however, no more force than was necessary for that purpose.

The respondents then offered evidence tending to prove that the said Davis had no interest in the said store, or goods, but that the same were the property of the respondent Joy, and were, at the time of the attachment, and for some time previous had been, in his possession, and that this was well known to all concerned; that the said Davis, Whitehill, Darling and one Eph. Low had previously conspired and agreed together to get the goods in the said store,—amounting, in value, to about \$1000,—out of the possession of said Joy, and into the hands of irresponsible persons, for the purpose of defrauding Joy out of the amount, or fraudulently compelling him to pay money to regain the possession of them; that the demands, upon which said writs were predicated, were fraudulent, and were procured in pursuance of said agreement; that all that was done by said Whitehill and Darling was done in pursuance of said agreement; that said Whitehill and Darling were irresponsible,—all which was well known to the said Whitehill; and that Whitehill's possession of the goods was only with the above mentioned fraudulent intent.

The respondents farther offered evidence tending to prove, that, at the time the respondents Buchanan and Morrison entered the store, as above stated, they had in their hands three legal writs of attachment against said Joy,—Buchanan being legally authorized to serve one of said writs, and Morrison being legally authorized to serve the other two, by the magistrate signing the same,—which writs they were directed, by the plaintiffs therein, to serve by attaching the said goods as the property of said Joy,—he having no other visible attachable property; that they entered the said store for the sole purpose of making such attachment, but, on account of the resistance of said Whitehill, were unable to do so without putting him out of the store,—which they did with no unnecessary force,—and that the other respondents acted as their assistants.

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To the admission of all the testimony, so offered by the respondents, the counsel for the prosecution objected, and the testimony was excluded by the court. The jury returned a verdict against the respondents. Exceptions by respondents.

T. Howard, state's attorney.

The respondents are without excuse; and we think that the principles, which must govern this case, have been fully settled, against the respondents, in the reported cases decided in this state. 2 Aik. 415. 6 Vt. 215. 8 Vt. 424. 12 Vt. 435. 13 Vt. 416.

C. Davis for respondents.

1. It seems by no means clear, that the case, as made out by the government, without reference to the defence, would warrant a verdict of guilty. Had the writ, commenced on Darling's writ, been made by a regular, known officer, possibly it would. We are aware that this is a question, which, if determined, that such officer cannot be rightly opposed by force, in the act of taking the property of one man to answer the process of another. See *State v. Downer et al.*, 8 Vt. 424. *Merritt v. Miller*, 13 Vt. 416. As limited and understood in those cases, this doctrine is indispensable to the preservation of the proper powers of such officers, in the service of process, and to the conservation of the public peace. But private individuals, specially deputed to serve process, are not invested with any such immunity. They have no powers, beyond those conferred by the process in their hands, which are to take the persons, or property, of the individuals named in the process. In doing this they are protected by law, though not to the same extent with known officers. Resistance to the latter is punished severely by statute; resistance to the former, when acting within the scope of the authority conferred upon them, is punishable, not in pursuance of any statute, but by the principles of the common law, which protects every man in the rightful exercise of every duty, or privilege. If such defeated person transcends his authority, and attempts to seize the persons, or property, of those against whom he holds no precept, he is left in the same predicament with any private individual, who does the same acts.

It follows, necessarily, that it should be made to appear that this

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was in fact the property of Davis,—or, at all events, that it was not the property of the respondents, or either of them, in defence of which from the forcible acts of trespassers they had the right to interpose. This point is left without evidence either way.

2. Was the act, for which the respondents were indicted, a *recap-tion*, or simple *defence*? The distinction may be important, not only in reference to the view of the case now under consideration, but to that first taken. It is manifest, that Whitehill had acquired no exclusive possession of the goods; he had removed none of them,—he had only commenced taking an inventory; it does not appear that he had taken possession of the key of the door, or that he had locked it, so as to exclude the owner, or his customers who resorted there to trade. The line of distinction between a case in which a party may lawfully resist intrusion upon his rights of property, and the case when, being fully dispossessed, he cannot assert his rights forcibly, but is driven to his action at law, may not always be of easy discrimination. To reduce it to the latter alternative, it must appear distinctly that the true owner is clearly dispossessed, so that, to repossess himself, it would be necessary to commit a breach of the peace. If he can repossess himself without such necessity, even by going on to the premises of the possessor, though expressly forbidden, and though the adverse possession may have continued for a whole year, he may do so. *Richardson v. Anthony*, 12 Vt. 273. *Chapman v. Thumblethorp*, Cro. Eliz. 829. Ham. N. P. 153.

3. Farther, the respondents offered to prove, on trial, that the proceedings of Whitehill and his employer, Darling, in making a pretended attachment, were the result of a conspiracy, in which Davis, the pretended debtor, participated,—the object of which was to wrest the possession of those goods from Joy, the owner, and defraud him out of them; that the supposed debt from Davis to Darling was fictitious; that all the proceedings under the writ were simulated, and done with the view of better effecting the fraudulent purpose aforesaid, and that Whitehill was fully cognizant of all these matters and a willing agent in the accomplishment of the object. This presents a strong case, undeniably,—little less so, indeed, than if the attempt to dispoil Joy of his property had been made by burglars and robbers.

I cannot conceive that any other answer can be given to this

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offer, than that they had successfully accomplished the dishonest and fraudulent purpose they contemplated, and the despoiled are bereft of any remedy, except an action at law, against persons perhaps altogether irresponsible. We think they had not fully accomplished their object,—they were surprised *flagrante delicto*.

The opinion of the court was delivered by

REDFIELD, J. The question how far an officer, about to make an attachment of personal property upon process against one having in fact no attachable interest in the same, may lawfully be resisted by the real owner of the property has been settled in this state by repeated decisions; *State v. Downer et al.*, 8 Vt. 424; *State v. Miller*, 12 Vt. 37; and the same doctrine distinctly recognized in the case of *Merritt v. Miller*, 13 Vt. 416. From these cases it being fully determined that such resistance against the attachment is unlawful, it must follow that a recapture of the property, after an attachment, would be equally unlawful, inasmuch as the recapture would necessarily include resistance to the officer, if done forcibly, as much as the greater includes the less in mathematics.

2. It is impossible to make any sound distinction between a specially appointed officer and a known public officer, as to the right to make or to continue an attachment,—inasmuch as the statute, in terms, puts their powers, in this respect, upon the same foundation. It enacts, “that the person so authorized shall have *all the power of the sheriff*, in the service and return of such process.” And if any such distinction could be maintained, there is manifestly no ground for it in the present case, as both officers were thus specially appointed;—they would of course be equal to each other, and, being by statute both equal to the sheriff, would have the same right to make, or continue, the attachment. It having been decided that the statute against impeding civil officers only extends to public officers will not affect this question, as it rests upon the construction of the words of the statute.

3. The remaining ground of defence, offered at the trial, consisted in a collateral impeachment of the processes in the hands of Whitehill. They were regular in form, and a full justification, to the extent of the authority apparent upon their face, until set aside by some proceeding brought to operate directly upon them. This

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is a universal principle in regard to processes, judgments, and all proceedings in courts of justice ; they are not allowed to be attacked in this collateral manner. If this could be done, a simple trial for assault and battery would branch out into an indefinite number of collateral issues, which would render such trials almost interminable.

Judgment that the respondents take nothing upon their exceptions, and that each pay a fine of ten dollars and costs of prosecution.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ESSEX.
MARCH TERM, 1845.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE,
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.

JOHN S. NELSON v. ARNOLD S. EMERY.

A bill of goods, sold, and paid for at the time of delivery, and receipted, cannot be reckoned as any part of the plaintiff's account, in determining the question of jurisdiction of an action of book account.

BOOK ACCOUNT. The action was commenced originally to the county court, and was sent out to an auditor, from whose report it appeared that the debit side of the plaintiff's account was made to exceed one hundred dollars by reckoning in, as a part of it, the amount of a bill of \$37.75, for goods purchased by the plaintiff for the defendant in Portland, in June, 1842, and which were paid for by the defendant, and the bill receipted, at the time the goods were delivered to the defendant, and which were first charged by the plaintiff in the autumn of 1843. After the report was returned, the action,

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upon the motion of the defendant, was dismissed by the county court, upon the ground that that court had not original jurisdiction of the suit; to which decision the plaintiff excepted.

W. Heywood, Jr. for plaintiff, cited *Reed v. Talford*, 10 Vt. 568.

Cooper, for defendant, cited Rev. St. 170, § 8; *Perkins v. Rich*, 12 Vt. 597; *Reed v. Talford*, 10 Vt. 568; *Scott et al. v. Sampson*, 9 Vt. 339; *Phelps et al. v. Wood*, 9 Vt. 399.

The opinion of the court was delivered by

REDFIELD, J. The only question in the present case is, whether the bill of goods, of \$37.75, purchased by the plaintiff in Portland for the defendant, and paid for and receipted at the time, and which was never charged in any account, unless the entry upon the bill presented before the auditor is so to be considered, can be treated as a portion of the plaintiff's account at the commencement of the action.

We think it is very obvious that it cannot. It never became matter of account, and had been absolutely paid and discharged long before this suit was brought.

Judgment affirmed.



OLIVER P. CHANDLER v. ARTEMAS CASWELL.

When a bond, or deed, comes in question incidentally, and solely for the purpose of proving that such an instrument was executed, its execution need not be proved by the subscribing witnesses,—nor, *Per WILLIAMS, CH. J.*, is its production necessary.

Where, in order to prove that the collector of a land tax had executed a bond to the committee appointed to superintend the expenditure of the tax, as required by statute, the bond itself was produced, it was held that its execution might be proved by one of the committee, to whom it was executed, and that it was not necessary to call the subscribing witnesses, although they were living, and within reach of process.

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EXPOSITION to recover lot No. 10 in the 11th range, and lot No. 10 in the 12th range, of lands in the town of Victory.

The plaintiff claimed title to lot No. 10 in the 11th range by virtue of a deed from Isaac Denison, collector of a tax of three cents upon each acre of land in said town, granted by the legislature of this state at their October session, 1836, and, in support of his title, offered in evidence a bond, in the penal sum of \$1250, purporting to have been signed by said Denison as principal, and Lucius Denison as surety, and witnessed by G. W. Denison and Anson Coe, and conditioned for the faithful discharge, by Isaac Denison, of his duties as collector. And the plaintiff claimed title to lot No. 10 in the 12th range by virtue of a vendue deed signed by Oliver P. Chandler, collector of a tax of three cents upon each acre of land in said town, granted by the legislature at their October session, 1830, and, in support of said title, offered in evidence a bond, purporting to have been signed by said Chandler, with surety, and witnessed, and executed to the committee appointed to superintend the expenditure of said tax, in pursuance of the statute. The defendant objected to the admission of said bonds without proof of their execution. The plaintiff then offered to prove the execution of said bonds by the said Isaac Denison, who was one of the committee appointed to superintend the expenditure of the tax granted in 1830; to whose admission the defendant objected, upon the ground that the execution of the bonds must be proved by the subscribing witnesses,—they being then living in this state; but the county court overruled the objection, and admitted the testimony of said Denison, to prove that the bonds were duly executed and delivered to the committee, and then allowed said bonds to be read in evidence to the jury, without requiring the subscribing witnesses to be called; to which decisions the defendant excepted.

The jury returned a verdict for the plaintiff for lot No. 10 in the 12th range.

D. Hubbard, Jr., for defendant.

The law requires the testimony of the subscribing witness to a deed, in order to prove its execution, or that his absence be accounted for, and his hand writing be proved. 1 Stark. Ev. 327, 328, 330, 331, 363, 373. 2 Ib. 475.

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On the part of the plaintiff the case was submitted without argument.

The opinion of the court was delivered by

WILLIAMS, CH. J. The plaintiff claimed title to the premises in question by virtue of two vendue deeds, and, in order to show that the collectors have complied with the directions of the statute, which requires a collector to give bonds, before he enters upon the duties of his office, to the committee appointed to superintend the expenditure of the tax, the bonds were produced. The defendant required that the subscribing witnesses should be produced. The court held that the evidence of one of the committee, to whom the bond was given, was sufficient. With respect to one of these bonds, to wit, the one executed by Denison, when he was collector, it does not distinctly appear how that was proved. The collector himself might not have been a competent witness, if objected to on account of interest; but no objection appears to have been taken on this ground, and the only decision, which the court made, was, that the subscribing witnesses need not be called, but that the giving the bonds might be proved by the committee.

Whenever a bond, or a deed, is the foundation of an action, or when it becomes a necessary part of a title, it is necessary that it should be proved in the usual way; but when it comes in question incidentally, solely for the purpose of proving that such an instrument was executed, neither is the production of the bond, nor, if produced, is the proof of the same by the subscribing witnesses, necessary. In some cases, even, where production of a bond is necessary, as a part of the case to be proved, proof of its execution is unnecessary. In an action against a sheriff, for taking insufficient sureties on a replevin bond, the bond, produced by the defendant, may be read in evidence without proof of its execution. *Scott v. Waithman*, 3 Stark. R. 169. The contents of a writing, which does not constitute the ground of the action, and is only collateral to the suit, and is not in the custody of the parties, may be proved by parol. *Wood v. Morris*, 12 East 237, and notes. *Stevens v. Pinney*, 8 Taunt. 325, [4 E. C. L. 117.] *Hurd v. Tuttle et al.*, 2 D. Ch. 43.

In the case under consideration the execution and delivery of the

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bond come in question only incidentally. The defendant has no interest in the bond, nor is the plaintiff to keep or have it in his custody, nor is there any provision that it should be kept, or retained, by the committee; and when the collector has collected and paid over the amount of the tax, the bond is satisfied. I can see no good reason for requiring of a purchaser under a vendue any evidence of the execution of a bond, except on the ground that such have been the adjudications of the court. In the case of *Coit v. Wells*, 2 Vt. 318, the only evidence that the collector had given a bond was the receipt of the committee; and although the proceedings of the collector, in that case, were scrutinized, and very stringent rules were laid down in regard to the proof necessary to sustain a sale of lands for taxes, yet it was not intimated that this *testimony*, as to the giving the bond, was inadmissible. The receipts of the committee have frequently been relied on to prove the giving the necessary bonds, without objection. The time of giving the bond may be material, and this can as well, or better, be proved by the committee, as by any other testimony,—or by their receipt.

We can see no good reason for requiring that the execution of the bond should be proved by the subscribing witnesses; but, taking into consideration the object for which this proof was offered, we think that the testimony of the committee themselves was competent and proper evidence to be received. The judgment of the county court is therefore affirmed.



PRESBY WEST v. ARNOLD S. EMERY.

If, under a declaration in trespass on the case, alleging that the defendant falsely warranted a horse to be sound, knowing him, at the time of making the warranty, to be unsound, the plaintiff prove a representation by the defendant of soundness, which, at the time of making it, the defendant knew to be false, it is sufficient to entitle the plaintiff to a verdict.

And if, in such case, the declaration allege an *absolute* representation of soundness, and a *scienter* by the defendant of its falsity, and the proof shows that the representation by the defendant was, that the property was sound, "so

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far as he knew," and the plaintiff also proves that the defendant in fact knew, at the time of making the representation, that the property was unsound, this will be no variance,—since a representation of absolute soundness and a representation qualified as above, which the defendant, at the time of making it, knows to be false, bind the defendant to the same extent.

But if the declaration allege an absolute warranty merely, and, as a breach, that the fact warranted did not exist, without alleging the *scienter*, this will not be supported by proof of a qualified warranty.

The identity of a contract is to be determined by looking at its breach; and so, where the gist of the action is *tort*, in the making false representations knowingly, the inquiry, whether there is a variance between the averment and the proof, turns upon the point whether the same proof constitutes equally a fraud under the averment, and under the representation as in fact made.

TRESPASS ON THE CASE for deceit in the sale of a horse. The declaration was in two counts, and alleged that the defendant falsely warranted the horse to be sound, except a lameness occasioned by being coked,—which was then apparent,—and that the defendant, at the time of making the warranty, *knew* that the warranty was false.

On the trial the plaintiff's testimony tended to prove, that, while the negotiation for the exchange of horses, as alleged in the declaration, was pending, the plaintiff asked the defendant if he would warrant his horse to be sound, and that the defendant replied, that he would not warrant any horse sound, but that "*his horse was sound, as far as he knew, except the cork,*" and that in fact the horse was unsound, and had the heaves badly, and that this was well known to the defendant and was not known to the plaintiff, and that the defendant's representation was made with a view to deceive the plaintiff, and that he was thereby deceived. The defendant's counsel objected to the testimony being received, on the ground of a variance between that and the declaration, and, the court entertaining doubts, the plaintiff obtained leave to file an additional count, under a rule, that, if he recovered only on that count, he should recover no back costs and should pay the defendant's costs to that time, with leave to save exceptions, if the court should decide against him.

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The jury returned a verdict for the plaintiff, and the court decided that the plaintiff was entitled to judgment upon his two first counts, and that there was no variance between the testimony, as above detailed, and the second count; to which decision the defendant excepted.

T. Bartlett, for defendant, cited 2 Saund. Pl. & Ev. 517.

W. Heywood, Jr., for plaintiff, contended that the evidence substantially corresponded with the averments in the two first counts of the declaration, and cited *Silver v. Kendrick*, 2 N. H. Rep. 160; *Rodman v. Forman*, 8 Johns. 26; *Henry v. Cleland*, 14 Ib. 400; *McKinley v. Rob*, 20 Ib. 351; *Saxton v. Johnson*, 10 Ib. 418; *Southwick v. Stevens*, 10 Ib. 443; *Lewis v. Few*, 5 Ib. 1; *Cunningham v. Kimball*, 7 Mass. 65; *Worster v. Canal Bridge Co.*, 16 Pick. 541; *Hastings v. Lovering*, 2 Ib. 214; *Andrews v. Williams*, 11 Conn. 326; *Riley v. Gourley*, 9 Ib. 154; *Beeman v. Buck*, 3 Vt. 53; *Wright v. Geer*, 6 Vt. 151; *Vail v. Strong*, 10 Vt. 457; *Allen v. Goff*, 13 Ib. 148; *Hutchinson v. Granger*, 13 Ib. 386.

The opinion of the court was delivered by

REDFIELD, J. The only question in this case is one of variance, that is, whether the plaintiff is entitled to judgment on his two first counts, or *only* upon the third count. This question is important only, it will be perceived, in regard to the amount of cost,—the last count having been filed during the final trial, under a rule that, if the plaintiff “should *only* recover upon his new count, he should recover no back costs, and pay costs to that time.” The county court held that the plaintiff was entitled to judgment on the two first counts, and we are now called upon to revise that decision. The counts are all, substantially, for a false warranty and fraud thereby, alleging the *scienter*,—as in the case of *Beeman v. Buck*, 3 Vt. 53. This last case is based mainly upon the case of *Williamson v. Allison*, 2 East 446. Under a declaration in this particular form it has been the practice in England, for more than fifty years, and in this state for nearly twenty years, to admit proof either of an express promise, or fraud. The plaintiff may still declare upon an express promise merely, without alleging fraud,—in which case he will be

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bound to prove an express warranty, as alleged, and cannot establish his right of recovery by proof of fraud merely.

The only difference in the counts in the present case is, that the first two counts allege a general warranty of soundness, with a specified exception of a particular defect, and the breach that the defendant well knew the horse to be otherwise unsound, lame, &c., and that this was the fact; and the last count alleges a false warranty of soundness *as far as the defendant knew*, with the same exception named in the first two counts, and alleges the same breach, precisely, as in the former counts. The proof precisely corresponded with the words of the last count, and the inquiry is, whether it does not *substantially* agree also with the first two counts.

1. We readily perceive, that, when the plaintiff relies upon proof of an express warranty, and alleges merely, as a breach, that the fact warranted did not exist,—which, in such case, will always entitle the plaintiff to recover,—there is a manifest difference between a warranty absolute in its terms, and a mere warranty of soundness to the extent of the defendant's knowledge; and a declaration upon an express warranty merely, absolute in its terms, would not be supported by the proof in the present case.

2. But when the defendant relies, as he did here, upon false and fraudulent representations merely, we do not perceive that there is any difference, so far as liability is concerned, whether the representation is that the horse is absolutely sound, or only that he is sound so far as the defendant knows. The defendant is not liable upon either of these representations, unless, at the time, *he knew the horse to be unsound*; and if he did then know this fact, he is equally liable, and to the same extent, on both or either of the representations.

It is the breach of a contract, to which we look to determine its identity; and when the same state of facts does not constitute equally a breach of the contract alleged in the declaration, and that proved on trial, there is a variance; so when the gist of the action is *tort* in the making false representations knowingly, the inquiry, as to the identity of averment and proof, turns on the corresponding point, that is, whether the same proof constitutes equally a fraud under the averment and the representation as in fact made. That, in the present case, is very obvious.

Judgment affirmed.

Webb *q. t. v.* Long.

GREENLIEF WEBB, *qui tam*, v. WILLIAM LONG.

The statute of 1821,—Sl. St. 266,—which imposed a penalty for being party to a fraudulent note, or judgment, continued in force until July, 1840, and all penalties incurred therefor prior to that time accrued subject to the provisions of that statute.

Under that statute the whole amount of a judgment was forfeited, though but part of the consideration was fraudulent.

There was an action brought to recover the penalty, imposed by the statute of Nov. 15, 1821, for being party to a fraudulent judgment. The action was referred, and the referee reported, in substance, that, on the 23d day of April, 1840, the plaintiff was a creditor of one James Long, that the said James was then the owner of certain cattle, which were of the value of one hundred and fifty dollars, that the said James, on that day, executed a note to the defendant for \$416.77, of which the sum of \$150 was fraudulent, and without consideration, that the said James then confessed judgment before a justice of the peace upon said note, and the defendant took out an execution upon said judgment and caused the said cattle to be sold thereon, that all this was done, both by James Long and the defendant, to defraud the plaintiff of his said debt, and that the defendant had justified the said note and judgment, as having been *bona fide* and upon good consideration.

The referee submitted two questions to the decision of the court, which were raised before him by the defendant,—one of which was, whether the statute of Nov. 15, 1821, on which this action was founded, was in force on the 23d day of April, 1840, and the other was, whether the defendant, under the facts found, had forfeited the whole amount of the judgment, being \$416.77, or whether he had only forfeited that portion of it which was fraudulent and without consideration, being \$150.00.

The county court rendered judgment for the plaintiff for \$416.77; to which decision the defendant excepted.

On the part of the defendant the case was submitted without argument.

Webb *q. t. v.* Long.

W. Heywood, Jr., for plaintiff.

The opinion of the court was delivered by

WILLIAMS, CH. J. The defendant attempts to raise but two questions in this case, and to neither of them can we attach much importance.

1. Whether, by the repeal of the act of the legislature of 1821, against fraudulent conveyances, the plaintiff's claim was not discharged. The fraudulent note, to which the defendant was a party, was executed the 23d of April, 1840. The statute, which repealed the act of 1821, was not to take effect until July, 1840, until which time the statute of 1821 continued in force; and, by the repealing act, no penalty, or forfeiture, accrued before the statute was repealed, was to be affected by the repeal; and we cannot see any question arising on this state of the law. The law, under which the forfeiture accrued, was in force in April, 1840, and the penalty was saved to the party aggrieved, by the terms of the repealing act.

2. The other question, as to the amount of the forfeiture, was decided in the case of *Wright q. t. v. Eldred*, 2 Aik. 401. One of the points made in that case was as to the amount of the forfeiture, and it was holden that the whole amount of the judgment was forfeited, though but part of the consideration was fraudulent.

The judgment of the county court is therefore affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORLEANS.

APRIL TERM, 1845.

PRESENT.

HON. CHARLES K. WILLIAMS, CHIEF JUDGE.
HON. STEPHEN ROYCE, } ASSISTANT JUDGES.
HON. ISAAC F. REDFIELD, }

**NORMAN BOARDMAN v. FRANCIS ROGER, WILLIAM BROWN AND
NATHAN KELTON.**

A mere trustee may sustain an action as bearer of a promissory note, made payable to a person specified or bearer, for the benefit of the owner, by his consent.

And such action may be sustained by one, as bearer, by direction of the legal owner of the note, though the note may never have been delivered to the person to whom it is made payable, and though his name may have been used as payee without his consent.

An officer, who takes from the receiptor of property attached a note, in satisfaction of the receiptor's liability for having permitted the property to be wasted, in the absence of all authority from the creditor so to do, becomes himself the absolute owner of such note.

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And if such note be sued in the name of a mere trustee, for the benefit of the officer, the officer, by an absolute and unconditional conveyance of his interest in the note to such trustee, taking back from the trustee a release from all liability on account of the suit, although such conveyance and release are wholly without consideration, is so divested of interest in the suit, as to become a competent witness for the plaintiff.

ASSUMPSIT upon a promissory note, payable to George C. West, or bearer. Plea, the general issue, and trial by the court.

On trial, the plaintiff proved the execution, by the defendants, of the note declared upon. From the evidence introduced by the defendants it appeared that one Thomas McKnight, a deputy sheriff, sometime in the year 1842, attached the personal property of one Joseph Riker, upon a writ of attachment in favor of David A. Smalley, and took the receipt of the defendant Roger for said property; that judgment was obtained against Riker in said suit, and execution thereon was delivered to said McKnight, as deputy sheriff, in due season to perfect the lien created by the said attachment upon said property; that said property was, in the mean time, wasted, or elogned, and Riker was unable to pay said execution, which was permitted to run out in the hands of McKnight, he having seasonably demanded the said property of Roger; that the note now in suit was thereupon made, for the purpose of raising money to pay said execution and one or two smaller executions against Roger, for which McKnight had become liable as deputy sheriff; that the note was made and signed without the knowledge of West, the payee, with an expectation that he would advance the money upon it,—but it did not appear that the note was ever presented to him for that purpose; and that the note was delivered by Roger to McKnight soon after its date, and was held by him until it became payable, and, within a very few days thereafter, was delivered by him to the plaintiff for collection, with directions that the plaintiff should apply the money, when collected, in payment of the several executions above mentioned.

The plaintiff, in the progress of the trial, called the said Thomas McKnight as a witness,—to whose admission the defendants objected, upon the ground of interest in the event of the cause. The plaintiff thereupon exhibited an assignment from McKnight to himself of all the interest of said McKnight in the note in suit, and

Boardman v. Roger et al.

McKnight exhibited a release from the plaintiff to himself of all obligation which he was under to indemnify the plaintiff against the costs and expenses of this suit. It appeared that the said assignment and release were executed without any thing being paid, or received, as a consideration therefor. The court then overruled the objection and admitted the witness, and he testified to facts material in the case.

Judgment was rendered for the plaintiff. Exceptions by defendants.

J. Cooper for defendants.

1. If common principles are correct, then the neglect of McKnight to return the execution against Riker, and account for the property attached on the writ, rendered his principal, the sheriff, liable for the amount of the execution, and of course made McKnight liable over to him for his neglect. This note was, by McKnight, placed in the hands of the plaintiff, in trust, to be by him collected and paid over to this and the other execution creditors, in discharge of this liability. If the note is collected, then McKnight will be discharged, when the trustee has done his duty. If the note is not collected, then McKnight still remains liable. The discharge from the plaintiff to McKnight did not discharge, nor assume to discharge, this liability. The plaintiff had no power to discharge it; he could only give an indemnity against it. The assignment from McKnight to the plaintiff did not discharge this liability. He only assigned his interest; and that was nothing; for the case shows that the plaintiff was never to pay or account for the note to McKnight, but to other persons. Neither does this assignment excuse the plaintiff from accounting for this note, if collected, to the persons with whom he agreed to account, when he received the note. If the execution debtors were to pay the executions to the creditors, and procure their discharge, could this plaintiff then recover? It is only upon the ground that he is trustee for others, that he can claim to recover; for it is only in that view that there would be any possible consideration for the note.

On the small executions McKnight was clearly liable, as the case shows; and he is interested thus far, without dispute. If the witness has an interest, the amount is of no importance. 1 Sw. Dig. 740. 2 Stark. Ev. 744, 746, 750.

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2. The only remaining question is, whether there was ever such a delivery of the note to West, and acceptance by him, as will entitle this plaintiff, or any other person, to recover on the note. We apprehend that this case is distinguishable from that of *Baxter v. Buck*, 10 Vt. 548. In that case the representative of the payee accepted the note, and gave a good consideration for it. In this case neither West, nor any other person on his behalf, has ever accepted the note.

N. Boardman and *H. P. Smith* for plaintiff.

1. It would seem that a note, payable to A. B. or bearer, is the same as if payable to A. B. or C. D., and, if so, no reason can be assigned why the bearer cannot as well maintain his action without a delivery to A. B., as with. *Grant v. Vaughan*, 3 Burr. 1516. *Matthews v. Hall*, 1 Vt. 323. *Baxter v. Buck*, 10 Vt. 553.

The note in question took effect upon delivery to McKnight. It was made and delivered to him unconditionally. He might have maintained an action thereon in his own name, as bearer, when the same became due, and as well may the plaintiff, to whom the same has been delivered and assigned. And the plaintiff might even have sustained an action in the name of West, had the note not been negotiable. *Thrall v. Benedict et al.*, 13 Vt. 248. *Bank of Burlington v. Beach*, 1 Aik. 62. *Baxter v. Buck*, 10 Vt. 553.

2. It is apparent, that the note in suit was made and delivered to McKnight as his property, and for his sole benefit. He accepted it for his own security. It was taken without the consent, or knowledge, of the creditors in the executions referred to. McKnight was not their agent for this purpose, and he did not assume to act as such. Consequently he had the right to dispose of the note in any manner he chose. It is true his interest related both to the subject matter in dispute, and to the payment of costs; but the release and assignment purged him of all such interest. And these instruments having been executed under seal, it makes no difference whether any consideration actually passed between the plaintiff and McKnight, or not. *Willing et al. v. Consequa*, 1 Pet. R. 307. *Baxter v. Buck*, 10 Vt. 553. *Moore v. Rich*, 12 Vt. 563, and the cases there cited. *Chase et al. v. Burnham et al.*, 13 Vt. 447.

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The opinion of the court was delivered by

REDFIELD, J. Of the right of a mere trustee, by the consent of the one beneficially interested, to sustain an action, in his own name, upon a promissory note payable to bearer, for the benefit of the real owner, there can be no doubt. *Smith v. Burton*, 3 Vt. 233. *Bank of Burlington v. Beach*, 1 Aik. 62. *Baxter v. Buck*, 10 Vt. 548.

We do not see, why this note was not the absolute property of McKnight. He was not the agent, or trustee, of the creditors, for the purpose of taking the note. So far from that, the officer had no right, except at his own peril, to take any such note. It is not impossible, that, in case of the utter insolvency of the sheriff, and the creditors having no other remedy, they might, in a court of equity, reach this note; but even this is questionable. They certainly could not control the note, short of showing a case of insolvency and fraud,—neither of which appear in the present case.

That being the case, McKnight might divest himself of all interest in the note, by an absolute gift to the plaintiff, if he saw fit.

Judgment affirmed.



DAVID S. ABBOTT v. TIMOTHY C. COBB.

A member of a voluntary association, formed for building a meeting house, who is appointed one of the building committee, and acts as such in making contracts and procuring materials for the building, is not individually liable to pay for services for which he thus contracts with one who knows his agency, and who knows that the contract is for the benefit of the association, and that it is entered into by the defendant merely as such agent.

If an action be brought against such agent, by one with whom he thus contracts for the benefit of the association, to recover for services rendered in pursuance of such contract, the individual members of the association are competent witnesses for the defendant,—their interest being equally balanced.

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If, in such case, written instruments were introduced and used as evidence before the auditor, which were objected to by the plaintiff as irrelevant, and which could, at most, have been only immaterial, but which might have had a tendency to show the relative situation of the parties, and that the defendant, in all he did, acted only as the agent of the association, this court will not reverse the judgment of the county court, accepting the auditor's report, for the reason that such writings were received.

BOOK ACCOUNT. An auditor was appointed in the county court, who reported, in substance, as follows.

The plaintiff presented an account, consisting of but one charge, amounting to \$8.00, for drawing lumber, which accrued under the following circumstances. In January, 1842, about thirty individuals, in Barton and the vicinity, voluntarily associated themselves together to build a congregational meeting house in the village of Barton, of which association the plaintiff and defendant were members. The association was originally formed, by the several individuals subscribing their names to a subscription paper, with such sums set to their respective names as they felt disposed to give for the purpose of building said meeting house. After this paper had been signed, the subscribers to it held a meeting, at which a location for the meeting house was agreed upon, and the assent of the subscribers thereto was evidenced by a paper to that effect, signed by the several members of the association. This last paper was signed by both the plaintiff and the defendant. After this another meeting was held, at which three of the members of the association were appointed a building committee, to superintend the building and furnishing of the house,—of which building committee the defendant was one, and the most active member, whose business it was to procure necessary lumber. At all these meetings the plaintiff was present, and did not dissent from the proceedings. Sometime in July, 1842, after these meetings had been held, and while the house was in progress, the defendant applied to the plaintiff to draw some boards from Derby, which had been bought for the house, and which were wanted towards its completion, asking the plaintiff to draw them, and let his charge for drawing be credited towards the amount of his subscription; the plaintiff did not engage to do so, and no arrangement was made at this time. A short time after this one Colby, who was engaged in finishing the house,

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again, at the defendant's request, requested the plaintiff to draw the boards, and Abbott did so, and charged therefor \$8.00, which was the charge now in controversy.

The plaintiff, when he drew the boards, knew that they were to be used by the association in the completion and finish of the meeting house, and that the defendant was acting as one of the building committee of the association, when he applied to him to draw the boards. The defendant, in requesting the plaintiff to draw the boards, acted only as building committee, and did not intend to make himself personally responsible to the plaintiff, and did intend, that, if the plaintiff drew the boards, he should draw them towards his original subscription; but the plaintiff did not intend so to draw them.

The defendant offered as evidence before the auditor, as tending to prove the existence of the association, and the acts of the same, the original articles of association, the written assent of the members to the location of the house, and several instruments showing the doings of the association at their meetings, and the division of the pews in the house among the members of the association. To the admission of all these the plaintiff objected, as irrelevant. But the objection was overruled by the auditor, and the evidence was admitted. In the progress of the hearing before the auditor the defendant called, as a witness, the secretary of the association,—to whose admission the plaintiff objected, upon the ground of interest; but the auditor overruled the objection, and admitted the witness.

The auditor reported that the defendant, at the time the plaintiff first demanded payment from him for drawing the boards, had no funds of the association in his hands, and had not had such funds from that time until the time of the audit. It appeared that there was a condition attached to the plaintiff's original subscription, that the amount of it should be paid in lumber, to be delivered by him at his saw mill, which was at variance with the contract expressed in the paper subscribed, and that Abbott had never expressly waived his right, if any he had, to pay the amount subscribed by him in lumber, and that the association never expressly, by any vote, or action at any meeting, disclaimed, or adopted, this subscription, but that the association, and Abbott himself, to the time of the final division of the pews, invariably acted as though Abbott was, *de facto*, a member of the association.

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The auditor decided that the plaintiff was not entitled to recover. The county court accepted the report, and rendered judgment in favor of the defendant; to which decision the plaintiff excepted.

C. W. & H. F. Prentiss and J. Cooper for plaintiff.

1. If the association, mentioned in the auditor's report, was a corporation under and by virtue of chap. 81 of Rev. St., 291, 292, 293, then the case of *Cheney v. Clark*, 3 Vt. 431, is not an authority against the plaintiff. It appears very clear that this association was a corporation.

2. The employment of the plaintiff to do the labor, which is the subject matter of his account, was by the defendant alone, not by the three members of the committee, nor by a majority. This did not bind the committee, and through them the association, or corporation. If a trust be public, a majority may bind; if private, all must concur. Here is neither all, nor a majority. The defendant therefore bound himself. *Ives v. Hulet*, 12 Vt. 314.

3. The plaintiff never consented to look for his pay to the committee, or the association, or corporation, but refused to do so on the personal application of the defendant. Of course the defendant was fully cognizant of this. It appears by the report that the defendant applied to the plaintiff to draw the boards and have the pay for his labor "credited on his subscription," "which the plaintiff however did not engage to do." It appears that the defendant afterwards made no personal application to the plaintiff, but sent Colby, who, in general terms, "requested the plaintiff to draw the boards." Is it not apparent, that, after a refusal on the first application, which was to draw the boards on the credit of the corporation, the second application, being in general terms to draw the boards, is to be understood with a reference to the first refusal, and shows that the labor was assumed on a different basis from that on which the first application was placed, and upon the credit of the defendant solely? For it does not appear that it was thought of at all, by either party, to draw the boards on the credit of the corporation, unless it was to go on plaintiff's subscription. *Morrison v. Heath*, 11 Vt. p. 610. Then why should the plaintiff be turned round to any other remedy than the present one? He has a remedy somewhere, and it is believed he has sought the only remedy which he can have by law.

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J. H. Kimball for defendant.

In whatever character the defendant acted, whether as agent for an association with corporate powers under the statute, or for an association of individuals merely, having a common interest, jointly concerned in a common purpose, he is not liable. *Cheney v. Clark*, 3 Vt. 431. If he made any promises, they were made in his capacity of agent, for services known to the plaintiff to be for their common interest, and which did not bind him personally. Sw. Dig. 329. *Proctor v. Webber*, 1 D. Ch. 371.

The opinion of the court was delivered by

WILLIAMS, CH. J. It is always necessary for a party, asking to recover of a defendant, to establish all the facts necessary to entitle him to a judgment. In the present case the plaintiff has made no proof against the defendant, and, if he should prevail, the defendant is made a debtor without his consent, and against his will.

The defendant was an agent of a voluntary association, of which the defendant and plaintiff were both members. The nature of his agency and the extent of his powers were known to the plaintiff. It is not made to appear that he exceeded his authority. It does not appear that he ever made himself personally liable to the plaintiff, for the claim he brings against him, or that he has any funds of the association for the purpose of paying the plaintiff; but the negative of all this is expressly found by the auditor. There can be no pretence, therefore, for charging the defendant with this claim of the plaintiff. Under a much stronger claim, in the case of *Cheney v. Clark*, 3 Vt. 431, and under a more favorable state of facts for the plaintiff, the court held the defendants not liable. That case was very similar to the one under consideration, in some particulars.

It is not perceived that there was any valid objection to the admission of the papers noticed in the report. If they were wholly immaterial, they could have occasioned no injury to either party. They might have been of some importance, in showing more clearly the relative situation of the parties, and that the defendant, in all he did, acted only as one of the building committee. We see no reason for rejecting them.

The secretary of the society, who was a member of the association, had no interest in this suit, in favor of the defendant, which

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should have excluded him from being a witness for the defendant. If the individual members of the association are personally liable, it is indifferent to them, whether they pay this claim to the plaintiff, or defendant.

The judgment of the county court is affirmed.



HARRIET BLOOD v. LEWIS MORRILL AND ALVIN FLINT.

A recognizance, taken by a judge of the county court in vacation, for the due appearance &c. of one who has been committed by a magistrate upon a warrant issued in a case for bastardy, becomes itself, upon being returned and filed in the county court, a part of the record, and is not required to be enrolled by the clerk.

In an action upon such recognizance, in which it is averred in the declaration that the recognizance was recorded in the county court and profert is made of the record, the proper proof, on the plea of *nul tiel record*, if the suit is in the same court, is an inspection of the original recognizance.

In order to exonerate the bail, in such case, from his liability for his principal, there must have been an actual surrender of the principal into the custody of the officers of the court, and this must be evidenced by an *exoneratur* entered upon the record. It is not sufficient that the principal, at the term of the county court to which the proceedings are made returnable, enters an appearance in the action by attorney, and himself attends court, prepared for a trial.

In a declaration upon such recognizance, an averment, that the court, on default, taxed the costs in the original action at a certain sum named, is not considered as a *descriptive averment*, but only as an *averment of a fact*; and if, on the production of the record, it does not appear that the court taxed the costs, it is no ground for objection, upon the plea of *nul tiel record*.

That a complaint for bastardy concludes with praying that the defendant may be made to answer, &c., agreeable to a certain statute law of this state, describing it, which statute was in fact repealed before the complaint was made, is no ground for objection,—the complaint being sufficient without any reference to the statute. The court will take notice of the general statutes of the state.

An order of affiliation, in a prosecution for bastardy, may be made by the county court upon the *default* of the defendant to appear and answer.

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DAST on recognizance. The plaintiff declared against the defendants,—“ In a plea that they, the said Lewis Morrill and Alvin Flint, render to the said Harriet Blood the sum of two hundred and fifty dollars, which they owe to and unjustly detain from her,— For that whereas the said defendants heretofore, to wit, on the 28th day of July, 1840, at Irasburgh aforesaid, came before the Hon Isaac Parker, then and still being a judge of the county court within and for Orleans county aforesaid, in their own proper persons, and acknowledged themselves then and there, before the Isaac Parker, judge as aforesaid, jointly and severally indebted to the said plaintiff in the said sum of two hundred and fifty dollars, above demanded, the said Lewis Morrill as principal and the said Alvin Flint as surety; and then and there the said Lewis Morrill and the said Alvin Flint, and each of them, did consent and grant that said sum of two hundred and fifty dollars should be levied of their and each of their goods and chattels, lands and tenements, and, for want thereof, of their respective bodies, to the use and behalf of the said Harriet Blood, under the condition, that whereas the said Harriet Blood, single woman, did, on the 23d day of July, 1840, in writing and on her oath, before Joseph Chapman, justice of the peace in and for said Orleans county, charge the said Lewis Morrill with having begotten a child upon the body of her, the said Harriet Blood, on or about the 25th day of March, 1840, at Irasburgh, in said Orleans county, and with being the father of said child,—which said child, when born, would be, unless prevented by a prior marriage, a bastard;—Now, therefore, if he, the said Lewis Morrill, should personally appear before the Hon. County Court, next to be held at Irasburgh, within and for said county of Orleans, on the fourth Tuesday of December, 1840, and abide and perform such order, or orders, as the said court should make in the premises, then said recognizance was to be void, otherwise of force. And although the said original complaint of the said plaintiff, charging the said Lewis Morrill, as aforesaid, on request of the plaintiff, and also the warrant issued on such complaint, together with a true record of the doings of such justice thereon, on the like request of the plaintiff, were duly returned to the said county court, which held its session on the fourth Tuesday of December, 1840, according to law, and said re-

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'cognizance of said defendants was likewise, by said Isaac Parker, judge as aforesaid, brought into said court, at the said last mentioned session of said court, to be recorded, and was thereupon, at the prayer of the said plaintiff, then and there recorded in the same court, as by the record of the said recognizance, still remaining in said court, more fully appears, and the said suit was, at the said term of the said court, by said court, continued until the next term of said court, which was to hold its session on the fourth Tuesday of June, 1841, and although, at the said term of the said court, which was held on the fourth Tuesday of June, 1841, the said plaintiff farther prosecuted her suit aforesaid against the said Lewis Morrill, yet, nevertheless, the said Lewis Morrill did not personally appear before the said county court, neither at the term of the said court which commenced its session on the fourth Tuesday of December, 1840, as aforesaid, nor at the term of the said court which commenced its session on the fourth Tuesday of June, 1841, but, being called at the last mentioned term of said court in open court, according to law, to answer to said suit, made default in the same, and judgment was thereupon rendered against the said Lewis Morrill by default, and his said default was thereupon duly recorded, and the said court, at their last mentioned term, thereupon ordered and adjudged that the said Lewis Morrill should pay fifty dollars, and the costs of said suit legally taxable against him, in six months after the date and time of said order, fifty dollars in one year, and fifty dollars in two years, after the date and time of said order, to the plaintiff, and that he, the said Lewis Morrill, should enter into recognizance, during the said last mentioned term of said court, for the payment of said sums and the costs, as aforesaid, which costs were taxed by said court at the sum of \$18.18. And the plaintiff avers that the said Lewis Morrill did not abide and perform the order, or orders, of said court, as aforesaid, during the said term last mentioned of said court, nor has the said Lewis Morrill since done the same, according to the tenor and condition of his said recognizance, and the said condition of the said recognizance hath become broken, and the said Lewis Morrill, at the term of said court last above mentioned, after his said default in the suit aforesaid, was duly called, according to law, to appear in said court in com-

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'pliance with his said recognizance, or the same would be forfeited, 'and the said Alvin Flint, at the same term of the court aforesaid, 'was also duly called, according to law, to have the said Lewis 'Morrill in court, in compliance with his said recognizance, or the 'same would be forfeited;—all which, and the several other proceedings of the said court, above set forth, at the said December 'Term and said June Term, will more fully and at large appear by 'the records and proceedings of said court, in said court now remaining. And the plaintiff avers that the said Lewis Morrill did 'not appear, after having been so called, as aforesaid, at the said 'June Term, 1841, nor did the said Alvin Flint render the said 'Lewis Morrill in court at the said June Term, 1841, and the recognizance of the said Lewis Morrill and the said Alvin Flint was 'thereupon, at the said June Term, 1841, by said court, declared 'forfeited, as will fully and at large appear by the proceedings and 'records aforesaid, in said court remaining; and the said judgment 'by default and the said recognizance still remain in full force 'and virtue, and in no way discharged, annulled, or vacated; 'wherefore and whereby, according to the form and effect of said 'recognizance, an action hath accrued to said plaintiff to demand 'and have of and from the said defendants the said sum of two hundred and fifty dollars, above demanded; Yet," &c.

The defendant pleaded,—1, That there was no such record of recognizance, as was alleged in the declaration;—2, That there was no such record of a judgment, as was alleged;—3, That the county court had no jurisdiction, to make any such order of payment by the defendant Morrill to the plaintiff, as was set forth in the declaration;—4, That the defendant Morrill did appear in the said action, in favor of the plaintiff against him, at the December Term, 1840, of Orleans county court, and submit himself to and abide all the orders and judgments in said action, which the said court then and there made;—and 5, That the defendant Morrill was prosecuted and sought to be charged by the plaintiff, in the original action, under the statute of Nov. 9, 1822, which statute was repealed prior to the commencement of the said prosecution. Upon these pleas issue was joined, and trial was had by the court.

On trial, the plaintiff, to support the issue upon his part on the first plea, offered in evidence the original recognizance, taken be-

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fore Hon. Isaac Parker, to the admission of which the defendants objected,—1, Because it did not appear to have been filed in court;—2, Because it was averred in the declaration that the recognizance was recorded, and profert was made of the record, and that fact was traversed by the plea, and therefore the issue could not be proved by the production of the original recognizance. The plaintiff then moved that the court direct the clerk to make a certificate on said recognizance that the same was received and filed, and the court directed and permitted the said indorsement to be made, notwithstanding the defendants objected thereto, and the recognizance was then received as proper and sufficient evidence under that plea. It appeared that the recognizance had never been in fact recorded at length by the clerk upon the records of the county court.

The plaintiff then, to sustain the issue upon his part on the second plea, offered in evidence a transcript of the records of the county court in the original action,—to the admission of which the defendants objected, upon the ground that it was averred in the declaration that the plaintiff's costs in the original action were taxed by the court at \$18.18, and it did not appear from the record that any costs were ever taxed; and also, that it was averred in the declaration that the defendant Morrill did not appear in court at the December Term, 1840, and it appeared, from the record offered, that he did appear; but the court overruled the objection and received the testimony.

The defendants, to sustain the issues upon their part on the third, fourth and fifth pleas, gave in evidence the original complaint before the justice,—which concluded in these words,—“Wherefore the ‘said Harriet prays that a warrant may go forth to apprehend the ‘body of the said Lewis Morrill, and that he may be brought before ‘your honor, and be made to answer the above complaint, and be ‘farther dealt with as to law and justice appertain, agreeable to a ‘certain statute law of this State, passed Nov. 9, 1822, entitled an ‘act relating to bastards and bastardy,”—and which complaint was dated the 22d day of July, 1840; also a copy of the records and proceedings before the said justice; also evidence tending to prove, that, at the December Term, 1840, of Orleans county court, when the original action was entered in court, the defendant Morrill entered an appearance in said action by attorney, and attended court himself, and was in court, ready for trial, but that the suit was by the court continued to the then next term.

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The county court rendered judgment for the plaintiff; to which decision the defendants excepted.

J. Cooper for defendants.

1. Whether the averment, in the declaration, of a record and a profert in court were necessary is one thing; and the proof of it is another. *Webb v. Herne*, 1 B. & P. 281. To say that the production of the original recognizance answers the averment is going too far; for the plea does not deny the existence of the recognizance, but of a *record* of the recognizance, as is alleged. The proof of a record, which is pleaded in court with a profert, on a plea of *nul tiel record*, if it be a record of the same court, is the production of the record. *Cutler v. Wadsworth*, 7 Conn. 6. 1 Stark. Ev. 150. 3 lb. 1276. 1 Sw. Dig. 750. 2 Saund. Pl. & Ev. 274, 275. *Allen v. Goff*, 13 Vt. 148. *Lowry v. Cady*, 4 Vt. 504. *Gilb. Ev.*, p. 9, n. 5. *Jacob's Law Dict.* 399.

2. The averment in the declaration is, that the costs were taxed and allowed in the county court at \$18.18, and that the defendant Morrill did not make his personal appearance before the county court at the December Term, 1840; while the record shows no taxation and allowance of costs at all, and that the defendant Morrill did appear at the December Term, 1840. These are clear variances, which are fatal, and the party has a right to take advantage of them in this way. 1 Chit. Pl. 427. 2 Saund. Pl. & Ev. 274, 275, 115, 117. *Grant v. Astle*, Dougl. 781. *Bristow v. Wright*, Dougl. 667-669, and notes. 3 Stark. Ev. 1542, 1547. 13 Vt. 148. *Avery v. Lewis*, 10 Vt. 332. 4 Vt. 502.

3. From an examination of the statute it is very clear that the county court have no power to make an order of affiliation, except in those cases where there has been an issue found by the jury, or court, and judgment has been rendered thereon.

4. The recognizance was not conditioned that the bail should surrender his principal in court, but that the defendant should make his personal appearance. When the defendant comes into court, and enters an appearance upon the docket by attorney, is not this an appearance? *Tidd's Pr.* 210. *Billings v. Avery*, 7 Conn. 228. *Simmons v. Adams et al.*, 15 Vt. 677. *Mather v. Clark*, 2 Aik. 209.

5. The prosecution was under the statute of 1822. The bail

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may take advantage of this fact. *Treasurer of Vt. v. Cook*, 6 Vt. 282. The fact, here, is distinctly pleaded and as distinctly traversed. If, on examination of the record, the fact alleged appears, then it is difficult to see how the plea can be found untrue.

C. W. Prentiss and H. F. Prentiss, for plaintiff, cited *Card v. Sargeant*, 15 Vt. 393; *Sherwin et al. v. Bliss*, 4 Vt. 96; 2 Stark. Ev. 704, 705; 1 Ib. 188, 189; *Lowry v. Cady et al.*, 4 Vt. 504; *Sisco v. Harmon*, 9 Vt. 129; *Treasurer of Vt. v. Pierce et al.*, 2 D. Ch. 106.

The opinion of the court was delivered by

REDFIELD, J. The exceptions, taken to the proceedings in this case, are very numerous, and some of them not a little difficult of apprehension.

1. In regard to the recognizance taken by Judge Parker in the vacation, it is said it should have been recorded, in order to make it evidence. By *recording*, here, is meant *enrolling*, I suppose. For unless the original taking of the recognizance is a record, the enrolling it, in the manner deeds are enrolled, (which, in common language, is well enough denominated recording,) would hardly make it a record. The enrolling of any paper never makes either the paper, or the enrolment, any more authentic. This is required to be done, in the case of lands conveyed, in order to pass the title, so far as third persons are concerned; but the original deed, when it can be had, is, after all, considered the best evidence, and is required to be produced, when the party has it in his power. So this recognizance, after being filed, became itself a part of the record; and the idea of enrolling such a paper, either in a criminal or civil case, never entered the mind of any clerk of the county court, I presume. The inspection of this record, as it was in the same court, was the proper evidence. When a bill of exceptions became necessary, a transcript of the record became important, as a part of the bill; but for any other purpose it would seem to be unimportant.

2. The variance, which is insisted upon, between the declaration and the record, in regard to the appearance of the principal conusor in discharge of the recognizance, is one of substance, and not of form. The question is, substantially, whether, when one appears

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in court by attorney, and is himself assisting in the conduct of his suit, or defence, he thereby exonerates his bail for appearance. Nothing is more clear, than that this is no "rendering" of the principal in discharge of the recognizance of bail. To effect that, there must be a formal surrender of the principal into the custody of the officers of court, which must be evidenced by an *exoneretur* entered upon the record, which, in the English practice, is entered upon the bail piece.

In *Williams v. Williams*, 1 Salk. 98, it is determined, that "The rendering is a discharge *in posse* as to bail, in three different pending actions, but not complete and actual until *exoneretur* entered." In *Ward v. Griffith*, 1 Ld. Raym. 83, the render of the principal, in discharge of his bail, was entered in the book of the warden of the *Fleet prison*, but no *committitur* being entered in the office, the discharge of the bail was held incomplete, notwithstanding the principal had died in prison; but a rule was finally obtained to stay proceedings in the case, upon other grounds. In this case the record of the recognizance is called a "pocket record," in contra-distinction to a record remaining in court. That distinction would be without any foundation in our practice.

3. The averment in the declaration, that the county court taxed and allowed the plaintiff's costs at \$18.18, is not made as a part of the description of the record; it is not, therefore, a *descriptive allegation*, like the allegation in the common form of declaration in debt upon judgment, that the plaintiff recovered so much debt, or damages, and so much costs of suit, but it is a mere *averment of a fact*, which, when the record is produced, is not verified. The failure of the proof of *this averment* is no variance, as it would have been, had the failure been in a *descriptive averment*.

4. The third plea, which is, that the county court had no power to make the order upon a default of the defendant, is not, we think, well founded. An order, in a case for bastardy, may as well be made upon default, as judgment may be rendered in any other case, in a civil action, by default.

5. The plea, that the complaint alleged the proceedings to be under a statute which was in fact repealed, is of no importance. There was no necessity of referring to the statute. The court will take

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notice of the general statutes of the state. A wrong reference could mislead no one, and could not make the complaint bad, when it would have been good without any reference.

Judgment affirmed.



TOWN OF TINMOUTH v. LEVI WARREN AND JONAS WARREN.

Where the son of a pauper was summoned to appear in the county court and show cause why he should not contribute to the support of the pauper, and he appeared and suggested that there was another son, of sufficient ability, and the latter was thereupon summoned also into court to answer to the original petition, and he appeared, and, at the third term after the citation was served upon him, filed a motion to dismiss the petition, as to himself, assigning, as cause, that the pauper had deceased before the service of the citation upon him, it was held that his motion was out of time, and that it should have been filed at the first term after the return of the citation.

But it was also held, that, inasmuch as the pauper was alive at the time service was made of the original petition and citation, and also at the time the citation issued to summon in the second brother, the motion should have been overruled, though filed in season,—as the statute, in such cases, makes the kindred liable for past, as well as future support.

Quare, Whether the proceedings of the county court upon such a petition can be revised upon exceptions.

THIS was a petition to the county court, founded upon chap. 16, sect. 14, of the Revised Statutes, praying that the petitionee Levi Warren might be ordered to contribute towards the support of his mother, Mary Warren, who was a pauper, and had been, and, at the time of preferring the petition, still was chargeable upon the town of Tinmouth. The citation attached to the petition was made returnable to the December Term, 1842, of Orleans county court. At that term Levi Warren appeared and suggested that there was another son of the pauper within the jurisdiction of the court, to wit, Jonas Warren, who was of sufficient ability, and should be made party defendant in the proceedings. The court thereupon ordered that the said Jonas Warren should be cited in to answer to

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the petition, and a citation was issued, and was made returnable to the June Term of the said county court, 1843, and was served upon the said Jonas Warren on the 14th day of June, 1843. At the said June Term, 1843, the said Jonas Warren appeared, and the case was continued. At the June Term of said court, 1844, the said Jonas Warren moved that he be dismissed from the suit, assigning as cause that the said Mary Warren deceased prior to the time of the service of the said citation upon him. On the hearing it appeared from the plaintiff's testimony that the said Mary Warren died on the 28th day of May, 1843. The court overruled the motion, and, finding the defendants of sufficient ability to pay the expenses sought to be recovered, rendered judgment against them severally for the amount of the said expenses, in shares proportioned to their relative ability to pay the same. Exceptions by defendants.

J. Cooper for defendants.

C. W. & H. F. Prentiss for plaintiffs.

The opinion of the court was delivered by

WILLIAMS, CH. J. This case comes before us on exceptions to the decision of the county court, overruling a motion to dismiss, which was filed by Jonas Warren at the term of the county court in June, 1844. From an inspection of the papers it appears that the town of Tinmouth, at the December Term of the county court, in 1842, preferred their complaint against Levi Warren, as one of the sons of Mary Warren, a pauper, to obtain an order on him to contribute to the support, both past and future, of the said Mary, under section 14 of chapter 16 of the Revised Statutes,—relative to the support and removal of paupers. On a suggestion of Levi Warren, that there was other kindred, to wit, Jonas Warren, of sufficient ability, the court, under the 19th section of the same statute, at the December Term of the court, 1842, aforesaid, summoned the said Jonas Warren to appear at the next term;—the effect of which is declared by the statute to be, that the court may proceed against him, as though summoned on the original complaint. This summons, which issued as of December, 1842, was not served on him until the 14th day of June, 1843, and was made returnable to

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the June Term of the court, which held its session on the fourth Tuesday of June. Previous to this, on the 28th day of May, 1843, the said Mary Warren died. The motion to dismiss was not filed in court, until the third term after Jonas Warren had been summoned in, as before mentioned.

In the first place, the motion was out of time. It was not made, until the term when there was a hearing on the merits of the complaint. It should have been made on the return of the process at the June Term, 1843, when all the facts existed, which are now claimed as existing, to support the motion.

But, in the second place, if made in time, we think there are no merits in it. The object of a complaint is, to obtain an order for past expenses, as well as future,—although the order cannot reach back more than six months previous to the filing the complaint. At the time of the filing the complaint, at the time of filing the suggestion, and at the time of issuing the summons to Jonas Warren, the pauper was alive. By virtue of the statute Jonas Warren became a party, “as if he had been summoned on the original complaint.” And although, by the death of the pauper, Levi and Jonas were relieved from the future support of their mother, yet for past expenses, not extending more than six months previous to filing the complaint, they were legally chargeable, under the statute aforesaid. The order was good against both, and the judgment of the county court is affirmed.

Whether the proceedings of the county court, under this statute, can be revised on exceptions, is a question to which we have not attended, and is undecided, as we are clearly of opinion that their views of the statute were correct.

WINDSOR COUNTY,

JULY ADJOURNED TERM, 1843.

[Continued from ante, page 73.]

JAMES C. BLOOD v. HOEL SAYRE.

Personal property, not in the possession of a tenant, is to be taxed in the town, in which the owner resides. The fifteenth section of the statute relating to the general list,—Rev. St. 544,—does not furnish a different rule, as to the property therein specified, where the owner resides in this state.

And it makes no difference, that the person assessed consented that the property should be set to him in the list of a town where he does not reside, and that he gave to the listers, in such town, a list, specifying the particular property thereon.

In this case, the plaintiff, who was an inhabitant of the town of N., was the owner of a stallion, which he was intending to keep, during the summer of 1840, in the towns of N. and T., and, prior to the first day of April, 1840, he took the horse to T., and kept him there until sometime after that day, with the intention of having the horse set to him in the list of that town; and in the month of April he gave in his list to the listers of T., specifying the horse, and the same was incorporated by them in the grand list of the town. Subsequently the horse was set to the list of the plaintiff in the town of N., where he resided, and he was compelled to pay taxes on him there; of which fact he apprised the defendant, who was constable of T., when he called upon the plaintiff for the taxes assessed against him on the list which he had given to the listers in T. And it was held that the proceedings of the listers in T. were illegal, and that the assessment of the tax against the plaintiff was void, and that the plaintiff might maintain an action of trover against the defendant for property distrained by him to satisfy said tax.

If persons, having a *limited* judicial authority, do any act beyond the scope of their authority, they make themselves trespassers.

TROVER for a harness. Plea, the general issue, with notice of justification under a collector's warrant. The case was submitted to the court upon a statement of facts, agreed to by the parties, which was, in substance, as follows.

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On the first day of April, 1840, the plaintiff resided in Norwich, and was the owner of a stallion, which he had kept in Norwich and Thetford the year previous, and which he intended to keep in those towns during the ensuing season. A few days prior to the first day of April, 1840, he took the horse to Thetford, and hired him kept there, for the purpose of having the horse put into the grand list of Thetford by the listers of that town. In the fore part of April he took the horse away. In the month of April he gave to the listers of Thetford his list, specifying said horse, dated at Thetford, and the list was regularly made out by the listers of said town, and by them duly returned to the town clerk, assessing the plaintiff for the horse. Subsequently, in the same year, the listers of Norwich two-folded the plaintiff, according to the statute, for said horse. The plaintiff never resided in Thetford. Taxes were legally assessed in Thetford upon the list of 1840, and the tax bills, with legal warrants attached thereto, were delivered to the defendant, who was constable of said town. In the summer of 1841 the defendant called upon the plaintiff for the taxes, and the plaintiff then informed him that he, plaintiff, had been two-folded by the listers of Norwich for the horse, and that he wished him to request the selectmen of Thetford to abate said taxes. The defendant, on the 26th day of February, 1842, distrained the harness, sued for in this action, and afterwards legally sold the same, to satisfy said taxes. On the day that the property was distrained the plaintiff exhibited to the defendant a certificate, signed by the listers of Norwich, that the said horse was set in the list of the plaintiff in Norwich, in 1840, and also a receipt, signed by the collector of Norwich, showing that the plaintiff had paid the taxes on the horse in Norwich. At the annual March meeting in Thetford, in 1842, the plaintiff applied to one of the selectmen of Thetford to have the said taxes abated, and exhibited to him the same certificate and receipt, and was told by him that he might apply to the other selectmen,—who were then present; but the plaintiff did not apply to either of them, nor did he ever make any application to the listers, or the selectmen, of Thetford, to alter his list on account of any mistake in giving in said horse in the list in Thetford.

The parties agreed, that, if the court should be of opinion, upon the foregoing facts, that the plaintiff was entitled to recover, judg-

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ment should be entered up for the plaintiff for \$20 damages, and his costs; but that otherwise judgment should be rendered for the defendant to recover his costs.

The county court rendered judgment in favor of the defendant; to which decision the plaintiff excepted.

O. P. Chandler for plaintiff.

1. A party, not inhabitant of a town, cannot be subject to taxation in such town; and it makes no difference that he gives in the list; *Preston v. Boston*, 12 Pick. 8; *Freeman v. Kenney*, 15 Pick. 44; *Lyman v. Fiske*, 17 Pick. 231.

2. If the party is not an inhabitant of the town, and not subject to taxation, then all proceedings, as against him, are illegal, and the assessors, and consequently the officer, are liable in trespass. They can have no jurisdiction, and the officer cannot justify under his warrant. *Agry v. Young et al.*, 11 Mass. 220; *Freeman v. Kenney*, 15 Pick. 44; *Lyman v. Fiske*, 17 Pick. 231.

3. The 15th section of the statute relating to the general list, which relates to animals of this description, cannot vary the rights of the parties. To give to it such a construction would contravene the provisions of the third section, which provides that property shall be set in the list, as on the first of April, and in the list of the owner.

A. Howard, Jr., for defendant.

1. The defendant contends, that the decision of the court below was correct. The plaintiff gave in his list to the listers in Thetford, and the listers were required by law to make out a list against the plaintiff, and return the same to the town clerk. Rev. St. 544, §§ 15-17.

2. The plaintiff never made any application to the listers, or the selectmen of Thetford, to alter or correct his list. If a person puts property into the list by mistake, that he was not bound to have given in, his only remedy is to apply to the listers and selectmen to alter and correct his list, or to the board of civil authority for an abatement, pursuant to the statute. Rev. St. 92, § 49. *Ib.* 541, § 8. *Ib.* 542, § 12. *Osborn v. Danvers*, 6 Pick. 98. *Ingraham v. Doggett et al.*, 5 Pick. 451.

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3. The plaintiff, by giving in his list in Thetford, increased the grand list for state and school taxes. If the plaintiff recover in this action, the town will suffer from his wrongful act. *Rev. St. 545, § 18. Ib. 546, § 19.*

4. This action cannot be sustained against the collector. It should have been brought against the listers. The rate-bill and warrant is a justification to the defendant. *Rev. St. 377, §§ 36, 37. Kinsley v. Hall, 9 N. H. Rep. 190. Wilcox v. Sherwin, 1 D. Ch. 72. Henry v. Edson et al., 2 Vt. 499. Cong. Society in Poultney v. Ashley et al., 10 Vt. 241. Hunt v. Lee et al., Ib. 297. Drew v. Davis et al., Ib. 506.*

5. The action *ex delicto* cannot be maintained against a collector, unless the assessment is void, or he has made himself a trespasser *ab initio*. In this case, the plaintiff consented to be taxed, and he cannot now take advantage of his own wrong. *Pease v. Whitney et al., 8 Mass. 93. Colman et al. v. Anderson, 10 Ib. 105.*

The opinion of the court was delivered by

BENNETT, J. This is an action of trover, and comes before the court upon a case agreed upon by the parties. For the facts of the case the court would refer to that agreement. By the statute, *Rev. St. 539, § 3*, personal property, not in the possession of a tenant, is to be taxed in the town in which the owner resides. The 15th section of the statute does not furnish a different rule, as to property of this description, where the owner resides in this state. Blood resided in Norwich, and had never resided in Thetford. He was not then within the jurisdiction of the listers of Thetford, and their whole proceedings as to him, were without authority and void *ab initio*. The case of *Preston v. Boston, 12 Pick. 12*, is in point.

This is not like the case of an *over-valuation* of one, who is liable to be taxed. Where a person is *subject* to taxation, and he, through mistake, has property set to him, of which he is not the owner, or is taxed for that for which he is not liable to be taxed, and also where there is an overvaluation, in all these cases he has a remedy under the statute; and if the listers shall refuse to give relief, he may appeal to the selectmen; and probably in such case, this might be held to be the only remedy. The case of *Osborn v. Danvers, 6 Pick. 98*, much relied upon by the defendant, is of this descrip-

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tion. The general rule of law is, that, if persons, having a *limited* judicial authority, do any act beyond the scope of their authority, they make themselves trespassers; though, if the act be done within the limit of their authority, they are excused, though it be done through an erroneous or mistaken judgment.

It is well settled, that trespass, and not case, is the proper remedy against the listers. It is not the undue assessment, which works the injury, but the subsequent proceedings, instituted to enforce the payment of the tax. Trover is a concurrent remedy with trespass. It is said, in argument, that, at all events, this action will not lie against the collector; but the law is otherwise in this state. The opinion of the majority of the court in *Wilcox v. Sherwin*, 1 D. Ch. 72, has been frequently overruled, and that of chief Justice Chipman established. The statute, which provides that no collector shall be liable to any action, which may accrue in consequence of any *mistake, mischarge, or overcharge*, in the tax-bill committed to him for collection, does not apply to this case. This is a case, where the action accrues by reason of the illegality of the imposition of the tax; and in such case the statute gives the collector a remedy over against the town. The case in the 9 N. H. Rep., to which we have been referred, was decided under a statute of that state widely different from ours.

It is urged in argument, that, as the plaintiff gave in his own list in the town of Thetford, he thereby consented to be there taxed, and that he ought not now to complain. A similar fact existed in the case of *Preston v. Boston*, 12 Pick.; yet it was held, that the consent of the plaintiff to be taxed could make no difference in a case, in which there was no legal liability; and that it would not afford any sufficient ground, upon which to levy a tax, the payment of which was to be enforced by compulsory process. It would doubtless be true, that, if the willingness had continued until the time of payment, so that it might have been considered that the payment was made voluntarily, the maxim *volenti non fit injuria* would well apply; and no action, in such case should be sustained to recover back the money.

In the case of *Pease v. Whitney*, 8 Mass. 95, it was held, that, though the tax was improperly assessed upon the plaintiff, yet his request to the assessors, to have the lands in question assessed to

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him, was an answer for the assessors in an action of trespass against them. The soundness of this opinion may well be questioned. The *gravamen* of the injury, in that case, was not the illegal assessment; but the proceedings, had under the color of the process, to enforce the payment of the tax, worked the injury. To hold that a consent to be taxed carries with it the consent of the party to all *dernier* proceedings, which may be had to compel a payment of the assessment, is a deduction altogether gratuitous, and would, as it seems to me, in effect, establish such a payment to be what the law calls a *voluntary* payment. But in the present case the plaintiff had requested the collector to get the tax abated, informing him that he had been two-folded in Norwich, for not listing the horse in that town, and that he had there paid the tax; this, of course, would amount to a withdrawal of any consent to an enforcement of the payment of the tax to Thetford, though such inference should otherwise be attempted to be drawn.

It is said, that the plaintiff, by giving in his list in Thetford, increased the grand list for state and school taxes; and that, if he recovers in this action, the town must suffer by reason of his wrongful act. It is a sufficient answer to this argument, to say that it was the town's own folly, to accept a list, in a case in which they had no right to impose a tax, and incorporate it in their grand list. The town should not complain of that which results from the folly of its listers.

We think, on the whole, that the decision of the county court should be reversed, and that there should be a judgment, on the case agreed, for the plaintiff to recover twenty dollars damages, and his costs;—which is entered up accordingly.

RUTLAND COUNTY,

SEPTEMBER ADJOURNED TERM, 1844.

[Continued from Vol. 16, page 354.]

SILAS W. HODGES v. OZIAS B. HOSFORD.

If an auditor, in an action on book account, decide a question of fact, and it appears, from his report, that there was any testimony before him tending to prove the fact as found by him, his decision is conclusive; but if he reports all the evidence, on which he based his finding, and that evidence has no tendency to prove the fact, his finding may be corrected by the court.

Where several of the plaintiff's charges, in an action on book account, were for articles delivered to others on account of the defendant, and the only proof, as to any order from the defendant for such delivery, was, that the persons, to whom the goods were delivered, resided in the immediate neighborhood of the defendant, and was frequently employed to do errands for him, or that he resided in the neighborhood of the defendant and frequently labored for him, or that he resided in the family of the defendant, and there were other charges in the account for articles delivered to the same person, the correctness of which was not denied by the defendant, and the auditor, from this proof, in each case, found the fact that the defendant authorized the delivery of the articles, it was held, that, in each of these cases, the evidence had a *tendency* to prove the fact, and that therefore the finding of the auditor was conclusive.

A settlement of book accounts, by the parties, is as conclusive as a judgment. In such case, it is not competent, in an action on book account between the parties, to examine the accounts, prior to the settlement, upon the mere *supposition* that a mistake exists; but the error must be first pointed out, and may then be corrected.

Book Account. Judgment to account was rendered, and an auditor was appointed, who reported, in substance, as follows.

Among the items of the plaintiff's account was a charge of money "paid to Miss Sheldon, \$0,58," which item the defendant disputed, but the auditor allowed the same, and reported that he presumed a

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request from the defendant to make the payment from the fact that Miss Sheldon "resided in the family or neighborhood of the defendant." The defendant also objected to several of the plaintiff's charges for payments to Abby Dexter; but the auditor reported, that "it appeared that Abby Dexter resided with the defendant for several years, as a member of his family, and that there were other charges for payments made to her, which were not objected to," and that "the auditor presumed a request" from the defendant to deliver the articles. The defendant also objected to an item of \$3,00 in the plaintiff's account, for articles which it appeared were, by order of one Rice, delivered by the plaintiff to one Tubbs and charged to the defendant, in reference to which the auditor reported, that "it appeared that Rice resided in the immediate neighborhood of the parties, and was frequently employed by them to do errands," and that "the auditor presumed he was directed by the defendant to give the order" for the articles. The defendant also objected to several charges, in the plaintiff's account, for articles delivered to one Fisher, in reference to which the auditor reported that "it appeared, that said Fisher resided in the neighborhood of the parties, and frequently labored for them and others," and "the auditor presumed a direction from the defendant" to pay said Fisher, as charged. The defendant also objected to an item of \$7.00, for money paid to Mary Ann Nurss; but the auditor reported that it appeared, that "Miss Nurss lived with the defendant for some time, and there was a similar charge made previous to this, to which the defendant did not object," and "the auditor presumed that the defendant directed Miss Nurss to procure the charge to be made against him.

It appeared, that, on the 15th day of February, 1822, the parties met, for the purpose of adjusting their previous dealings, and agreed upon the balance then due; but no settlement was made upon the books of either party, and the dealings between them were continued, as before. The defendant now claimed to have the accounts adjusted by the auditor, which accrued prior to that settlement; but the auditor decided that he could not go back of that settlement.

The auditor reported that there was a balance due to the plaintiff of \$977.68. The defendant filed exceptions to the report, which were overruled by the court, and the report was accepted; to which decision the defendant excepted.

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----- for defendant.

Where an auditor presumes a fact, without any evidence to sustain the presumption, the court will correct the error; *Warden v. Johnson*, 11 Vt. 455; *Phelps et al. v. Wood*, 9 Vt. 400.

The facts found by the auditor, relative to the residence and occupation of the persons, to whom goods were delivered, furnished no evidence to warrant the conclusion that the defendant authorized them to take up goods on his account. The fact, that some articles were charged, as delivered to the same persons, and not disputed, furnishes no evidence, which should warrant the auditor in presuming that they were authorized to take up other goods.

The auditor should not have refused to examine the accounts prior to Feb. 15, 1822, notwithstanding he finds the accounts were adjusted to that date. If there was a mistake in that settlement, it was his duty to investigate it; *Darling v. Hall*, 5 Vt. 91; *Whiting v. Carwin*, Ib. 451.

S. H. & E. F. Hodges for plaintiff.

The plaintiff submits that the several questions, decided by the auditor, were merely questions of facts; that there was evidence, from which he might legitimately draw his conclusions; and that these are not subject to be revised by any other tribunal; *Kent v. Hancock*, 13 Vt. 519.

The opinion of the court was delivered by

HEBARD, J. Two classes of objections to the auditor's report have been urged.

The first is to the allowance, by the auditor, of various items, for articles delivered to third person. So far as the questions depend upon the existence of facts, and the auditor has found the facts, his finding must be conclusive. The question here is, had the plaintiff any authority from the defendant to deliver these articles to those persons upon the defendant's credit? If there was any testimony, which tended to prove such authority, and the auditor so finds, this court is not to inquire as to the quantity of evidence, that ought to satisfy him. But if the auditor reports the evidence, upon which he based his finding, and that evidence has no tendency to prove the fact, his finding then is erroneous, and may be corrected. In this case there is evidence, tending to prove the fact.

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The auditor has found the fact that the plaintiff was authorized by the defendant to deliver those articles. We regard the phraseology of the report as meaning that the auditor found the fact as proved. I think the term *presumption* is not the most appropriate expression; but, understanding the meaning as before stated, it is of little importance what words are used to express the meaning. A presumption is usually more matter of *law* than of fact.

The other objection, which the defendant makes, is, that the auditor refused to go into an examination of the accounts previous to Feb. 15, 1822. The parties were competent to settle and adjust their accounts at any time; and whether they did so settle is purely a question of fact; and if a settlement has been made by the parties, it operates as effectually to quiet the accounts as a judgment, and the principle of law, that allows of the correction of mistakes, does in no sense stand in the way of this view of the case. Whether the account has been settled by the parties, or by a judgment, it is not competent to go into the examination of the account, upon the mere supposition that a mistake exists; the error is first to be discovered, and then it may be corrected.

The case of *Whitney v. Corwin* is to this point. It was urged by the defendant in that case, that, if the account, notwithstanding the settlement, was still open to correct the *error* made in settlement, the whole account was open and unsettled, and that consequently the justice would lose his jurisdiction. But the court held that the settlement was not to be disturbed, any farther than to correct the mistake, and that the whole account was not to be re-examined.

In this case the auditor has found the fact of the settlement by the parties, and he decided correctly, in not disturbing that settlement, after having found its existence.

Judgment affirmed.

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TOWN OF PAWLET v. TOWN OF SANDGATE.

An indorsement upon a paper, that it has been "received into record," is not a compliance with a law which requires it to be recorded;—the record must be made by actually transcribing the paper into a book kept for that purpose.

The burden of proof is upon the town causing a warning out process, under the statute of 1801, to be served upon a pauper residing within its limits, to prove that the warning was recorded, as required by law, within one year from the time the pauper commenced his residence in the town.

And the court will not presume that the warning was recorded within the year, from the fact that a copy is produced, on trial, which is certified by the town clerk to be "a true copy of record," and which has upon it a copy of a certificate, made upon the original, at the time it was returned to the town clerk's office, signed by the town clerk then in office, and certifying that the warning was "received into record," and bearing date at a time within the year.

When the time of recording a paper in the town clerk's office is rendered material by statute, the town clerk's certificate, showing the time when it was in fact recorded, is competent evidence as to that point.

APPEAL from an order of removal, made by two justices, of one Elizabeth Draper, a pauper, from the town of Pawlet to the town of Sandgate. Plea, that the last place of legal settlement of said pauper was not in Sandgate, and trial by jury.

On trial the plaintiff introduced evidence tending to prove, that Elizabeth Hills, the mother of the pauper, came to reside in Sandgate in the spring of the year 1806, and resided there from that time for more than three years, that the pauper, during all that time, was a minor, and lived under the care and charge of her mother, and that the said Elizabeth Hills was, during all that time, a widow.

The defendants introduced evidence tending to prove that the said Elizabeth Hills did not come to Sandgate to reside until the spring of the year 1807, and that she resided there until 1810, and they introduced a certified copy of the record of a warning to the said Elizabeth Hills to depart from said town, under the statute of 1801, and the officer's return thereon. The warning was dated

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October 4, 1807, and was duly served October 7, 1807, and was indorsed, by the then town clerk, as follows; "Received into record, 9th October, 1807." The certificate of the town clerk attached to said copy, was in these words; "Sandgate, April 7, 1843. I hereby certify the foregoing is a true copy of record, as recorded among the records of the town of Sandgate."

The plaintiffs then offered in evidence a copy of the same warning and officer's return, with the town clerk's certificate attached thereto, in these words; "I hereby certify that the above is a true copy of a record, made by me March 25, 1842, and examined by me April 25, 1842." The defendants objected to so much of said certificate as specified the time when the record was made; but the court overruled the objection, and decided that the said certificate was *prima facie* evidence that the said warning and officer's return were not recorded in the town clerk's office of Sandgate within one year after the said Elizabeth Hills came to reside in said Sandgate, and that the said warning would not, therefore, prevent the said Elizabeth Hills from gaining a settlement in Sandgate. The defendants thereupon submitted to a verdict for the plaintiffs, and accepted to the above decisions of the court.

D. Roberts, Jr., for defendants.

1. Town clerks are made certifying officers, as to what appears upon the records of the town; Rev. St. 90, § 33; but, as this is only by virtue of the statute, it follows, that their certificate as to any extraneous fact, such as the time when, or the circumstances under which, any record was made, is unofficial, and no better than the certificate of any other person. When, therefore, in this case, the town clerk certifies that the record was made in 1842, he certifies to something *not in the book*, and we want his oath for it. *Coff v. Wells*, 2 Vt. 318. *Hathaway v. Goodrich*, 5 Vt. 65. *Blodget v. Jordan*, 6 Vt. 580.

2. This warning is found upon the record. It appeared upon the record that the same was "received into record" on the 9th of October, 1807,—and it is so certified in the copy given in evidence by the defendants. This, standing by itself, it can scarce be doubted, shows the warning "entered on the records" of the town at that date. It is difficult, then, to see how the certificate upon

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the copy presented by the plaintiffs, that the present town clerk recorded a like paper in 1842, affords any evidence that the first was not recorded previously.

8. The warning was returned by the constable in proper time, and, (upon the court's supposition) the town clerk indorsed upon it "Received into record, October 9, 1807," and affixed thereto his name and official character. We contend that this, of itself, at any rate with the subsequent copying of the paper upon the town books, would be an entry on the records of the town, within the meaning of the statute. This paper was received, not simply *for* record, but *into* record, as made such by the authentication of the town clerk, and treating that as an entry on the records of the town, making it a record of itself.

G. W. Harmon for plaintiffs.

The copy of the record, given in evidence by the defendants, was defective, in not stating when the original process was recorded by the town clerk,—leaving that fact wholly to inference. The paper introduced by the plaintiffs had no farther effect, than to render certain that which before was doubtful; and the certificate was none other than should have been made by the town clerk upon the paper offered by the defendants. 3 Vt. 89.

The opinion of the court was delivered by

HEBARD, J. This case is made to turn upon the validity of a warning out process, issued by they selectmen of Sandgate against Elizabeth Hills. No objection is made to the process itself, or to the service of it. The questions grew out of the record. The law, in force at the time the process issued and was served, required a record to be made of it by the town clerk in one year. It seems, that the officer made service of it on the 7th of October, 1807, and returned it into the town clerk's office on the 9th of October, and the town clerk endorsed upon it "Rec'd into record, Oct. 9, 1807."

This could not be regarded as a record. If there was not originally a settled and well defined meaning of the term, there must be at this time; and it is hardly to be supposed, that there can be any difference of understanding, as to what the term imports. The object of a record is, not only to give the instrument *perpetuity*, but

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publicity; and it is now well understood, that that is to be done by transcribing the paper into a book kept for that purpose.

But the copy of the process, which the defendant produces, has the certificate of the town clerk, that the same is recorded; but neither the *record*, nor the *certificate* of the town clerk, shows when in fact the record was made, and the defendant insists that the court will infer that it was made when the paper was received for record, as nothing appears to the contrary. This will, in some measure, depend upon whom rests the burden of proof.

It has uniformly been held, that the liability of towns to support their poor is matter "*stricti juris*," and not a matter of *equity*,—and therefore the laws affecting those liabilities have received a strict construction. In this case the town of Sandgate seeks to be released from this liability, by its own act, and to fix the liability upon *Pawlet*. This being the purpose and the intended effect, before the town of Sandgate can be freed from this liability, and thus fix it upon *Pawlet*, it should appear, *affirmatively*, that all, that the law requires to be done, was done. The law requires this record to be made within one year. It then becomes the duty of Sandgate to show *affirmatively*, and not by intendment, that this *requisition* of the law had been complied with.

But the plaintiff introduced a copy of the same record, with the certificate of the clerk who made the record, setting forth the time, when the record was in fact made. The defendant objected to this certificate, on the ground that the statute had not made the town clerk a certifying officer for this purpose. But we think the certificate of the town clerk was properly admitted, to show the time. The law has made the time of recording material. If the *materiality* as to the time grew out of the *fortuitous* happening of events, or the accidental *combination of circumstances*, it would be different, and the time probably should be proved, like other facts. But as it is, the time when the record is made is a part of the law, that gives it any efficacy, and we think the officer who made the record, is, by the law, charged with the duty of certifying the time.

Judgment affirmed.

CHITTENDEN COUNTY,

JANUARY TERM, 1845.

[Continued from ante, page 189.]

THE PROBATE COURT FOR THE DISTRICT OF CHITTENDEN, CHARLES D. KASSON, Administrator of TRUMAN POWELL, *Prosecutor*, v. NEHEMIAH SAXTON.

Upon a general demurrer to a plea, which is defective in substance, judgment will, nevertheless, be rendered, that the plea is sufficient, if the declaration is fatally defective in substance.

If, in a declaration upon an administrator's bond, the breach assigned be the non payment of a debt allowed by the commissioners against the estate, the creditor must at least set forth so much in his declaration, as will show that the administrator was liable to pay the whole debt. It is not sufficient to allege that there was a large amount of property that belonged to the estate, "and more than sufficient to pay all debts allowed by the commissioners against the estate, and all charges and expenses of administering on the same." And if the state be in fact insolvent, the declaration must show that an order of distribution and payment has been made by the probate court.

DEBT upon a bond, executed by the defendant and one Louisa Rice, conditioned for the faithful performance, by the said Louisa, of the duties imposed upon her by law as administratrix upon the estate of Mark Rice. The breaches assigned in the declaration were,—First, That the said Louisa did not make and return a true inventory of the estate of the said Mark Rice;—Second, That she did not, by the time specified in the bond, nor ever before, or afterwards, render to the probate court an account of her administration;—Third, That the said estate was, by the said Louisa, represented insolvent, and commissioners were appointed, and the said Powell presented before them a claim against the estate, upon which there was allowed to him the sum of \$56.75; that "a large amount of

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'real and personal estate, belonging to the estate of the said Mark Rice, came to the knowledge and possession of said Louisa, as 'such administratrix, to wit, more that \$10.000, to wit, on the 20th 'day of April, 1830, and more than sufficient to pay all debts allowed by the said commissioners against the estate of the said 'Mark Rice and all charges and expenses of administering on the 'same;" and that the said Louisa wholly refused to pay the amount of the claim so allowed to the said Powell.

Judgment was rendered for the penalty of the bond, pursuant to the statute, and the defendant pleaded, to the breaches assigned, that the said Louisa Rice did make a true and perfect inventory of all and singular the goods &c. of the said deceased, and cause the same to be appraised, and duly returned the said inventory to the said probate court, and the same goods &c. did well and truly administer, according to law, until discharged from her said administration, and did render a just and true account of her said administration to said probate court, to the acceptance of said court, and that, by reason of the intermarriage of the said Louisa, her power as such administratrix ceased, and therefore, on the 14th of January, 1832, one Walter Robins was appointed administrator *de bonis non* of said estate, and accepted the trust, and gave bonds according to law, and that the said Louisa delivered up all the goods &c. of the said estate, which were not administered upon, to the said Robins, who received the same. To this plea the prosecutor demurred.

The county court decided, *pro forma*, that the said plea was insufficient; to which decision the defendant excepted.

C. D. Kasson for plaintiff.

C. Adams for defendant.

The opinion of the court was delivered by

HEARD, J. The first breach assigned is, that the administratrix did not make a true inventory of the estate. This is directly met by the plea. The second breach is, that she did not render an account of her administration on the 30th day of August, 1830, nor at any time before, or afterwards. The plea alleges, that she did well and truly administer the estate, until discharged, and did ren-

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der her account, which was accepted by the probate court. The third breach is, that she did not pay the debts, though the time for so doing had elapsed. The answer to this is, that the plaintiff does not allege, that the probate court has made any decree for the payment of the debts.

The remark is so common, that it is hardly necessary to repeat it, that a bad plea is good enough for a bad declaration; and, as the plea is demurred to, we must look back and see whether the plaintiff has set up enough to entitle him to recover. It is alleged that there was a large amount of property, that belonged to the estate, and more than enough to pay all debts allowed by the commissioners, and all charges and expenses of administering on the *same*. But neither the amount of the property nor the amount of the debts is set forth. If the creditor claims to have his whole debt paid, he must, at least, set out so much in his declaration, as will show that the administrator is liable to pay the whole. If he had stated, that there was sufficient to pay the debts, after paying the expense of administration, family expenses, and assignment to the *widow* and for support of children, it would have presented a different question; and nothing short of this would present a state of facts, from which this court could decide upon the administrator's liability. If the estate is in fact solvent, then there is no doubt that there must be a decree of distribution and payment.

As this declaration stands, there is no such averment of facts, as show to this court that the administratrix had sufficient assets to pay all the debts; and there is no allegation of any decree for the payment of the whole, or a part.

The judgment of the county court is reversed, and judgment rendered for the defendant, that the plea in bar is sufficient.

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GEORGE B. SHAW, Administrator of ROBERT MOODY, v. JOHN W. PARTRIDGE.

The rents, which accrue from the wife's real estate during coverture, are the absolute property of the husband, and, in case of his decease, do not survive to the wife, but are assets in the hands of the husband's administrator and must be collected by him.

If the lessee have covenanted, by the terms of the lease, to pay rent to the lessor, he does not become discharged from this liability by assigning the leasehold premises to a third person; but, in case the rent is not paid by the assignee, as it becomes due, an action of covenant may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor may have received rent from the assignee, and accepted him as tenant of the premises. But, *PER HEBARD, J.*, it would be different, if the action were debt, instead of covenant broken.

A lessor by perpetual lease, reserving rent, has an assignable interest in the estate; and if he assign his interest to one as administrator of the estate of a deceased person, such administrator will hold that interest, as assets of the estate, in the same manner and for the same purpose that he holds the other property of the estate, and subject to the same order of the probate court.

And if, the lessor's interest in the estate being thus assigned to an administrator of an intestate, the probate court decree the same, as part of the intestate's estate, to the widow of the intestate, it will become her property; and, the covenant to pay rent running with the land, she, or her husband, if she subsequently marry, may maintain an action upon that covenant against the lessee.

And in such case there is no variance, though the declaration describe a personal covenant by the lessee, and the lease offered in evidence show a covenant running with the land.

THIS was an action of covenant, brought to recover the rent reserved by a lease, and was commenced by Robert Moody, who deceased after the service of the writ upon the defendant and prior to the return day of the same. The plaintiff, Shaw, was appointed administrator upon the estate of Moody, and entered to prosecute the action before the justice, to whom the writ was made returnable, and the action came to the county court by appeal.

It was alleged, in the declaration, that, on the first day of April, 1820, one William L. Harrington leased to the defendant certain

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premises, by perpetual lease, reserving a yearly rent of \$90.00; that the defendant entered into possession of the demised premises; that, on the first day of November, 1828, the said Harrington, by deed of assignment, transferred &c. to Jabez Penniman, administrator of the estate of George Y. Harrington, deceased, the said premises and rights demised and set forth in the said lease, together with the lease itself; that the said premises, on the first day of January, 1830, were, by the probate court for the district of Chittenden, set off to Adelia A. Harrington, widow of the said George Y. Harrington, as a part of her dower in the estate of her said husband; that afterwards the said Moody was married to the said Adelia, and was, at the time of commencing this action, her husband; and that one year's rent, which became due April 1, 1841, was still in arrear and unpaid to the said Moody.

The defendant pleaded several pleas, as follows:—1. *Non est factum*. 2. That, after the service of this writ, and before the return day of the same, the said Moody deceased; and that thereupon the said rent, sued for, survived to the said Adelia, his widow, and vested exclusively in her; and therefore the administrator could not prosecute this action. 3. The same, in substance, as the second. 4. That there never was any such deed of assignment, from William L. Harrington to Jabez Penniman, as described in the plaintiff's declaration. 5. That the said William L. Harrington conveyed all his interest in said estate to one Jabez Penniman, to hold to him and his heirs and assigns forever, and that the same was the property of the said Penniman at the time of the commencement of this action, *absque hoc*, that the same ever belonged to the estate of the said George Y. Harrington, or to the said Adelia. 6. That the defendant, after the making of the lease, and before the rent sued for became due, assigned all his interest and estate in the demised premises to one Frederick Purdy, who entered into possession thereof, and that the said Adelia accepted the said Purdy, as tenant of the premises, and received from him, as such tenant, one year's rent. 7. That after the making of the said lease, and before the rent sued for became due, the defendant assigned all his interest in the premises to one Nathaniel Blood, who entered into possession of said premises; and that, after the entry of said Blood, the said Moody, then being the husband of the said Adelia,

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accepted the said Blood as the true and only tenant of the premises, and received from him one year's rent of the premises.

The plaintiff demurred to the second, third, sixth and seventh pleas, and joined issue upon the first and fourth, and replied to the fifth plea, that, at the time of the decree of the probate court, mentioned in the declaration, the said rents and profits and all interest in the same belonged to the estate of the said George Y. Harrington; and upon this replication to the fifth plea the defendant joined issue. Trial by the court.

On trial the parties admitted the existence of the decree of the probate court, setting off the rents reserved upon said estate to the said Adelia, then the widow of George Y. Harrington, and also the intermarriage of the said Adelia with the said Moody, and the death of said Moody. The plaintiff then offered in evidence the lease declared upon, which contained a covenant in these words; "And the said John W. Partridge, for himself, his heirs, executors and administrators, doth covenant and agree to and with the said William L. Harrington, his executors, administrators and assigns, that he, the said John W. Partridge, his executors, administrators and assigns, shall well and truly pay, or cause to be paid, unto the said William L. Harrington, his heirs, executors, administrators, or assigns, the aforesaid yearly rent or sum of \$30.90, on the said first day of April annually, during the term of this lease," &c. The term of the demise was expressed to be "from the day of the date of this lease, so long as grass grows and water runs." The plaintiff also offered in evidence an assignment of the said lease, and of the interest of the lessor in the demised premises, from William L. Harrington to Jabez Penniman, which purported to convey the same to said Penniman, "as administrator to the estate of George Y. Harrington, late of said Burlington, deceased," to have and to hold "to him, the said Jabez, in his capacity aforesaid, and to his heirs and assigns forever." To the admission of these papers the defendant objected, upon the ground of variance between them and the declaration, but the court overruled the objection, and admitted them in evidence.

Upon this evidence the court rendered judgment in favor of the plaintiff upon all the issues joined in the case. Exceptions by defendant.

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C. D. Kasson for defendant.

I. The declaration is bad in substance.

1. On a covenant entered into before coverture, and on which the husband claims in right of his wife, the wife should be joined.

2. The declaration shows no such *privity* of either *estate*, or *contract*, in the plaintiff, as to give him a right of action on the covenant. 1 Ch. Pl. 402. Stephen's Pl. 328-31.

3. Even though Moody took his interest in the lease by actual *assignment* from the original lessor and his assigns to himself, he could not maintain this action against the original lessee,—between whom and himself there is no *privity of contract*. The assignee of the covenantee cannot, at common law, maintain an action on an *express* or *personal* covenant of the lessee; and all the cases, which seem to sustain the contrary doctrine, are those controlled by the statute of 33 Hen. 8., c. 34. *Thursby v. Plant*, 1 Saund. 240, n. 3, 6. *Vernon v. Smith*, 5 B. & Ald. 1. *Milnes v. Branch*, 5 M. & S. 416. *Church v. Brown*, 15 Ves. 262, 263. 1 Ch. Pl. 18, 19, 23, n.

II. There is a variance between the covenant declared on, which is *personal to the defendant*, and the covenant offered in evidence, which is evidently intended to run with the land, as it binds both the covenantor and his assigns.

III. If there be no variance, then does the covenant in the lease *run with the land* and follow the assignment of the lessee? The true distinction is taken by this court in *Kimpton v. Walker*, 9 Vt. 199, where it is said, if the assignee would be liable and bound to discharge the covenant, then it does run with the land, and an assignment of the term and acceptance of the tenant discharge the original lessee, as is alleged in the sixth and seventh pleas. *Holford v. Hatch*, 1 Dougl. 186, and note. *Williams v. Bosanquet*, 5 E. C. L. 72. *Marrow v. Turpin*, Cro. Eliz. 715. The seventh plea alleges, that the assignee expressly covenanted to pay the rent, &c., and that he was accepted by the lessor and his assignees. So the lessor and his assigns might have covenant against him by *privity of contract*, debt, by *privity of estate*, or ejectment, for non payment of rent;—which shows that all *privity* is destroyed, as between these parties.

IV. The rent survives to the wife of Moody. It was not the

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land, but the right to the *annuity*, or rent reserved, to which the wife was entitled; and this, not being reduced to possession during coverture, survives to the wife. The *annuity* was her "estate,"—the *land* was the estate of the lessee.

V. The effect of the assignment to Penniman was to vest the estate in him, and not in the estate of G. Y. Harrington. The words "administrator" &c. are mere *descriptio personæ*. Story on Ag. 150, §151. The words "heirs and assigns" are the technical, operative words, to convey an estate of *inheritance*, or *fee*; Shep. Touch. 101, 108-9. *Turrett v. Taylor*, 3 U. S. Cond. R. 263. 8 Johns. 303. 9 Johns. 74.

— for plaintiff.

1. The rents which accrued during coverture, and which were unpaid at the decease of Moody, go to his executor, and not to the widow. 1 Sw. Dig. 28, 37. *Decker v. Livingston*, 15 Johns. 479. 2 Kent 110, 113. Reeve's Dom. Rel. 30.

2. The lease contains an express covenant to pay rent; and in such case the original lessee is liable to an action of covenant, notwithstanding his interest in the lease was assigned, and rent has been accepted from the assignee. *Auriol v. Mills*, 4 T. R. 94. *Thursby v. Plant*, 1 Saund. R. 233, & n. 5. 1 Ch. Pl. 36. Dane's Ab. c. 106, art. 5, §1. 4 Cruise 72, 76.

3. The assignment to Penniman, in the terms used, could not vest the legal title to the premises in Penniman, in his personal capacity, but did vest the whole estate and interest therein in those who were entitled by our law of distribution of estates; *Summer, Adm'r, v. Williams*, 8 Mass. 162.

4. The rent reserved in the lease is an incorporeal hereditament, and, as such, the widow was entitled to dower therein. Rev. St. 289, §1. 2 Bl. Com. 132. 4 Kent 40, 41.

5. But, should the court be of opinion that the assignment to Penniman vested the legal estate in him as a private person, then we say, that, at least, it conveyed the premises to him in trust for the benefit of George Y. Harrington's estate; Rev. St. 315, §22; and we are relieved by the statute of Hen. 8. This statute has executed the use, thereby making the legal representatives of the estate of George Y. Harrington complete owners of the lands and tene-

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ments, as well at law as in equity. 2 Bl. Com. 333. 1 Saund. R. 254, n. 6. *Williston v. White*, 11 Vt. 40. Thus the use became liable to dower, and was properly set off to the widow of George Y. Harrington; 2 Bl. Com. 233; Reeve's Dom. Rel. 90; and the legal right to sue for and recover the rents, which accrued after her marriage with Moody, vested in the plaintiff.

The opinion of the court was delivered by

HEBARD, J. This action is based upon a lease from William L. Harrington to the defendant, dated April 1, 1820, which lease contains a covenant on the part of the defendant to pay to the said Harrington, his heirs, or assigns, a yearly rent. On the first day of November, 1828, the said Harrington assigned this indenture, and all his interest in the premises, to Jabez Penniman as administrator of the estate of George Y. Harrington. This interest was, by the probate court, on the first day of January, 1839, set off to the widow of the said George Y. Harrington, as part of her dower in his estate. Afterwards the said Moody intermarried with the widow, and, after suit brought, but before trial, he deceased. To the action the defendant has pleaded several pleas in bar, some of which were traversed, and the others demurred to. Upon these pleas several questions are presented.

And the first is, whether this suit can progress, after the decease of Moody, in the name of his administrator. By the marriage Moody became possessed of whatever interest his wife had in the premises; and the rent, that became due in his lifetime, was his, and subject to his control. This rent having accrued during coverture, it was not necessary to join his wife in the suit, and it does not survive to the wife. The result would be, that, if the husband, in his lifetime, had not commenced the suit, after his decease this rent, which accrued in his lifetime, and during coverture, would be assets in the hands of the administrator, and must be collected by him.

It is farther objected to the plaintiff's right of recovery, that there is no such privity of contract between the parties, as gave Moody any right to recover,—on the ground that the defendant, before this rent had accrued, had transferred and assigned all his interest in the lease and the premises to another person. This objection would

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as well lie, if the action had been brought by Harrington, the *lessor*, as when brought by an *assignee* of the *lessor*; and this must depend upon the *covenant*.

The plea, upon which this question arises, and to which there is a demurrer, alleges, that, before any of this rent accrued, the defendant set over and assigned all his interest in the premises to one Blood, who entered and took possession of the same; and that afterwards the said Moody received of said Blood one year's rent, and then and there accepted said Blood as the only true and proper tenant of the premises. All that may be true, and not discharge the defendant from his covenant. If the action had been debt, instead of covenant broken, it would be different.

When the landlord leases the premises, he takes into consideration the fitness and responsibility of the lessee. The lessee assigns the premises to whom he pleases; the landlord has nothing to do in selecting the under-tenant. But it is a common principle of law, that, when a man enters into an express covenant to pay rent, that covenant continues binding upon him, notwithstanding he have assigned the lease. The same rule of law, that would thus relieve him from his liability on his covenant, would absolve him from any liability upon his promise to pay a stipulated sum for the purchase of property, if he should see fit to divest himself of that property, before the promise was enforced. This point is fully established in the case of *Auriol v. Mills*, 4 T. R. 94. That is a strong case and establishes more, than is necessary in the present case. There the lessee had been dispossessed of the demised premises, before the rent became due, by the operation of law and the acts of other persons. In the case at bar the defendant, by his own deed, assigned the premises to Blood voluntarily.

The main question remains to be considered; and that is, whether Adelia A. Harrington, the widow of George Y. Harrington, was legally the assignee of the lessor, so that she, or any other person in her right, could maintain this action. The objection to this is, that the decree of the probate court was inoperative and gave her no interest in the premises. It is not pretended, but what here was such an interest in land, as would make it the subject of such a decree, if this interest was legally in the estate of the said George Y. Harrington. This was a durable lease, and William L. Harrington had an

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assignable interest in the estate, and, by his deed in the usual form, assigned all his interest in the premises to Jabez Penniman, as administrator of the estate of George Y. Harrington, to hold in his capacity of administrator.

The inquiry may naturally arise here,—in what other way could this interest have been assigned, so as to have vested it in the estate of George Y. Harrington? If it had been assigned to the *estate*, in terms, it would have been void. There being no other depository appointed by law, the administrator was the proper person for this purpose, to receive the title for the time being. He is, *pro hac vice*, the representative of the deceased, and, with reference to the property, stands in his place.

If, then, this interest was held by Penniman in his capacity of administrator, it was held by him in the same *manner* and for the same *purpose*, that the other property of the estate was held, and subject to the same orders of the probate court. When it was thus assigned to the administrator, it became, by operation of law, the property of the estate, or, more properly speaking, a part of the estate, of George Y. Harrington; and, by virtue of the decree of the probate court, it became the property of Adelia Harrington. This was a covenant that run with the land; and, as the interest in the land passed, it carried the covenant along with it; so that there was the same privity of contract and privity of estate between the parties, that there would have been, if the assignment had been made to George Y. Harrington in his lifetime, and had then passed to his widow by the decree of the probate court, as in the present instance.

This also disposes of the question of variance; for, with this view of the case, the plaintiff declared, at least, according to the legal effect of the assignment.

Judgment affirmed.

FRANKLIN COUNTY,

JANUARY TERM, 1845.

[Continued from ante, page 218.]

SAMUEL MAXFIELD v. MADISON SCOTT.

A person, who is specially authorized to serve a writ, and who serves the same by attaching property, and delivers the property to a receiptor, may maintain an action upon the receipt, against such receiptor, in his own name, if the receiptor, after due demand by a legal officer, refuse to deliver the property to be disposed of upon the execution.

If the receipt, in such case, is signed by several, and they, in terms, "jointly and severally" promise to keep and deliver up the property, or pay all damage, the officer taking the receipt may maintain an action thereon against any one of such signers; and it is unnecessary to notice, in the declaration, the fact that there were other signers of the receipt.

When a declaration counts directly upon an instrument in writing, and does not profess to rectify it, it is sufficient to declare according to the legal effect of the instrument.

Where, in a receipt for property attached upon *mesne* process, the receiptor promises to safely keep the property, and deliver it to the officer holding the execution which may be obtained in the suit, or "pay all cost and damage, in case of failure," and the judgment finally recovered by the plaintiff in the suit, together with the cost and officer's fees, for which the receiptor is liable, amount to a sum less than \$100, the county court have not jurisdiction of an action upon the receipt, notwithstanding the value of the property attached, as expressed in the receipt, may exceed \$100.00.

If the county court have not original jurisdiction of an action commenced in that court, yet, if the parties mutually agree to a reference of the action, under an order of court, and it is referred, the objection on account of the want of jurisdiction is thereby waived.

ASSUMPSIT upon a receipt for property attached on *mesne* process.

The plaintiff alleged in his declaration, in substance, that he was specially authorized by a justice of the peace, pursuant to the

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statute, to serve a writ in favor of Henry Maxfield against Jabez Woodworth and George W. Woodworth; that he made service of said writ upon Jabez Woodworth by attaching certain personal property, describing it, of the value of \$143.00; that he delivered the said property to the defendant, who promised to safely keep the same, and deliver it to the plaintiff, or any proper officer, who might hold an execution in favor of Henry Maxfield upon the suit aforesaid, upon demand, or pay all cost and damage in case of failure; that the said writ was returned *non est inventus* as to George W. Woodworth; that the said Henry Maxfield eventually recovered judgment against said Jabez Woodworth, in said suit, for \$60.94, damages, and \$18.66, costs of suit; that said Henry Maxfield took out an execution on said judgment, and delivered the same to one Morgan, a deputy sheriff; that said Morgan duly demanded said property of the defendant; that the defendant refused to deliver the property to said Morgan; that said Morgan returned the execution to the clerk of the court, from whom it issued, with the sum of \$2.61 endorsed on the same as his fees thereon; and that said judgment and execution still remained unpaid.

The writ was made returnable to the September Term, 1843, of Franklin county court, and was continued to the April Term, 1844, of said court, at which term the parties mutually agreed to a reference of the cause, under an order of court, pursuant to the statute, and the cause was so referred. At the next term of the court the referees made their report, showing the facts in the case to be, in substance, as follows.

The writ in favor of Henry Maxfield was sued out, and the plaintiff was, by the magistrate, before whom the writ was made returnable, authorized to serve the same, and service thereof was made, as set forth in the plaintiff's declaration, and the property attached was, by the plaintiff, delivered to Jabez Woodworth, and a receipt was taken by the plaintiff therefor, which was signed by the defendant, and by Jabez Woodworth, Carlton Woodworth and Charles Spalding. The receipt described the property attached, and specified its value as being \$151.00, and also described the note in suit as being given for \$73.84, and the signers, in terms, "jointly and severally" promised to keep the said property safe, and deliver the same to the plaintiff, or any proper officer, who might have an exe-

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execution in favor of Henry Maxfield upon the writ aforesaid, upon demand, "or pay all cost and damage in case of failure." Judgment was eventually recovered by Henry Maxfield, in said suit, against Jabez Woodworth, for the sums specified in the declaration, and an execution was taken out and placed in the hands of a deputy sheriff, in due season, who made a legal demand of the property of the defendant, and, the defendant not delivering to him the property, he returned the execution with his fees indorsed thereon, amounting to \$2.61. The judgment and execution remained unpaid.

The defendant insisted, before the referees, that the plaintiff could not recover, unless he proved that he had paid said execution, or had, in some way, become liable to pay it; but the referees decided that the facts proved in the case were sufficient, to entitle the plaintiff to maintain this action for the benefit of Henry Maxfield. The defendant objected to the receipt, as evidence in the case, on the ground that it was signed by several, whereas the declaration described a promise by the defendant alone; but the referees overruled the objection. The defendant also insisted that the county court had not jurisdiction of this case, as the whole sum of the judgment and expenses, which the plaintiff could, in any event, recover, was less than \$100; this objection, also, was overruled; and the referees, who reported that they intended to decide, in all respects, according to the principles of law, found a sum due to the plaintiff of \$88.14.

The defendant filed exceptions to the report, which were overruled in the county court, and judgment was rendered in favor of the plaintiff upon the report. Exceptions by defendant.

Hunt & Nutting for defendant.

Judgment should be rendered, upon the report, for the defendant to recover his costs.

1. An authorized officer has all the authority of a regular officer, but incurs none of the liabilities. Rev. St. 171, §§ 22, 23.

2. A receipt for property attached, if signed by two or more, is necessarily a joint contract, and cannot be sued severally, though it may express a joint and several promise.

3. If several suits could be maintained on the receipt, yet, in the

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manner in which this declaration is drawn, the receipt should have been rejected for variance.

4. If, from the examination of the contract declared upon, with the *ad damnum*, it appears that the court have not jurisdiction of the cause of action, the cause should be dismissed on motion, and this at any stage of the proceedings. Rev. St. 170. Ib. 160, § 7. *Thompson v. Colony*, 6 Vt. 93.

5. It will be seen, from the declaration, that the execution, with the officer's fees thereon, in favor of Henry Maxfield against Jabez Woodworth, was the only measure of damages; and this with the interest thereon being less than \$100, the suit was originally cognizable before a justice of the peace, and not before the county court. *Thompson v. Colony*, 6 Vt. 93. *Bates v. Downer*, 4 Vt. 178. *Southwick et al. v. Merrill*, 3 Vt. 320. *Ladd v. Hill*, 4 Vt. 164. *Morrison v. Moore*, 4 Vt. 264. *Putney v. Bellows*, 8 Vt. 272. *Perkins v. Rich*, 12 Vt. 592. *Kittredge v. Rollins*, 12 Vt. 541.

6. The court not having jurisdiction of the subject matter, no act of the party, such as going to trial upon the merits, referring the case, &c., can give them jurisdiction; and a motion to dismiss is never out of time. *Thompson v. Colony*, 6 Vt. 93. *Stoughton v. Mott*, 13 Vt. 175. *Evans v. Balton*, 2 Dall. 368. *Perkins v. Perkins*, 7 Conn. 558. *Latham v. Edgerton*, 9 Cow. 227. *Borden v. Fitch*, 15 Johns. 141. *Mills v. Martin*, 19 Johns. 33. *Bigelow v. Stearns*, Ib. 39. *Reynolds v. Orvis*, 7 Cow. 269. *Martin v. Commonwealth*, 1 Mass. 347. *Lawrence v. Smith*, 5 Mass. 362.

H. E. Hubbell and *A. O. Aldis* for plaintiff.

1. The county court had original jurisdiction of the cause. Upon the face of the declaration the matter in demand was more than \$100. The defendant is sued, as upon his several receipt to re-deliver property valued at \$151.00. *Catlin v. Lowry*, 1 D. Ch. 396. *Page v. Thrall*, 11 Vt. 230.

2. The agreement of the parties to refer the case gives jurisdiction to the court to accept the award of the referees. On the *face of the record*, in the case, the court had jurisdiction of the *parties* and of the *subject matter*. The court, by agreement of parties, and

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a rule of court, "may refer any cause pending in such court." Rev. St. 162, § 21. The court can only tell if a cause be "pending" by inspecting the record. In this case it was impossible for the court to anticipate what facts might be shown on trial, which might tend to sustain, or take away, its jurisdiction. *Fargo v. Remington*, 6 Vt. 131.

But, even if, on the record, the court had no apparent jurisdiction, the agreement to refer gives jurisdiction to the court, to accept the report of the referees. An agreement to refer is the voluntary act of the parties, and they thereby waive all questions as to the jurisdiction. *Forseth v. Shaw*, 10 Mass. 253. The plaintiff, after a rule to refer, cannot enter a nonsuit, or discontinuance, without the consent of the other party. *Haskell v. Whitney*, 12 Mass. 47. 4 Dall. 222.

The opinion of the court was delivered by

HEBARD, J. Several questions have been made. 1. It is objected, that the plaintiff cannot maintain this action, for the reason that he was an authorized person. If the law recognizes him for the purpose of making *legal service*, and creating a *lien* by way of attachment of property, all this power would be lost, if he could not perfect the lien in the manner here attempted. The case of *Thayer v. Hutchinson et al.*, 13 Vt. 504, establishes the authority of the receptor to pursue the property for the *benefit* of the *authorized person*. If the receptor, in such case, could pursue the property against a third person, the authorized person could have his action against the *receptor*.

2. It is objected, that the suit should have been against all the signers of the receipt. This is fully disposed of by the receipt itself. The signers take upon themselves a joint and several obligation.

3. As to the variance,—the declaration is according to the legal effect of the receipt; and that is sufficient, when the action counts directly upon the paper. In this case the plaintiff does not recite the paper, but declares against the defendant, according to his liability, and the paper is merely given in evidence.

4. The next objection to the judgment of the county court is, that the court had no original jurisdiction of the suit. The question of jurisdiction is not unfrequently a very perplexing question, and the

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courts have, in a variety of cases, attempted to give some general rules in relation to the subject ; but it is, after all, found that each case must, in some measure, depend upon the particular circumstances of the case ; and there is a degree of discretion allowed to the county court, in determining the question. But I believe it has always been held necessary, that the plaintiff should do so much, at least, as to state his case on paper, in such a manner, that, if all he alleges is true, it will appear that the court has jurisdiction. If he does that, and the claim sound in damages, and by the proof it appears that he had reasonable grounds for believing that he should recover over \$100, still, in ordinary cases, if the damages happen to fall below \$100, the case will not, of course, be dismissed for want of jurisdiction.

To determine whether the court had jurisdiction in this case, it becomes necessary to see, in the first place, what the plaintiff sets up, as the basis of his claim. It seems that the plaintiff was authorized to serve a writ, that he attached property upon the writ to the value of more than \$100, and took the receipt of the defendant and others for the property, in which they jointly and severally promised to keep and deliver the property, "*or pay all cost and damage in case of failure ;*" and the amount of the note, upon which the property was attached, is specified in the *receipt*. The plaintiff in that suit obtained judgment and took his execution and delivered it to an officer, and this property was demanded of the defendant, and was not delivered, and this suit is brought against him to recover the cost and damage occasioned by the defendant's failure to deliver the property, agreeably to the terms of the receipt. This is the basis of the plaintiff's claim, as he has given it himself. By looking farther into the writ, we shall see what he sets up as the measure of the damage upon his own basis.

By the declaration it appears that the judgment in that suit, damages and cost, amounted to \$79.60, and, with the other incidents to it, in the whole, amounted to \$84 ; and the plaintiff sums up and concludes his declaration by saying, that said judgment is wholly unsatisfied, that it is still in force, and the same is still due, with the fees and interest on the same, and that the defendant refuses to pay the same, though it has been demanded of him. From this it is apparent, that his claim, as he has seen fit to present it, is as much

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a matter of computation, as a note of hand. He only claims the amount of the judgment, officer's fees and interest. He sets up no claim to the value of the property, but, agreeably to the terms of the receipt, he goes for the damage and cost occasioned by a failure on the part of defendant to deliver the property to the officer, when demanded. This being all he was entitled to recover, and all that he could reasonably *suppose* that he was entitled to recover, and, above all, being all that he has declared for in his writ, it is very clear, that, when the action was entered in the county court, that court had no jurisdiction of it.

When the case thus stood in the county court, the defendant, as well as the plaintiff, having the whole of the plaintiff's claim set forth, by which they had an opportunity to know and judge of it, agreed to a reference; and the question now is, what effect that agreement to refer the case had upon the jurisdiction of the court.

In the first place, it would be *inequitable* and unjust for the defendant to *experiment* upon the merits of the plaintiff's claim, before a *tribunal* created by the parties, for the express purpose of taking a more equitable view of the case, than would be consonant with the rules and legal forms of proceeding before the court, and, when unsuccessful there, to throw himself back upon a defect, that was apparent in the outset, and which might have been taken advantage of, before the expense of litigating the merits of the case had been incurred.

In the second place, we think that the statute, providing for this mode of trial, intended to take the case out of the ordinary principles of *law*, which govern proceedings. It is regarded as a mere arbitration, for most purposes, and the court will not revise any of the doings of the referees, unless they say in their report that they intended to be governed by legal principles. The case, under the provision of the statute, is kept so far in the court, that *liens* may be preserved, and execution issue to carry into effect the judgment of the referees. When the cause is referred, it is before another *tribunal*; and it is not unusual that the parties refer matters, not embraced in the action in court. In England, and in some of the United States, this reference is called an *arbitration*,—the court still retaining all the power over it, that our court does over the reference. The effect, in short, of this reference, as of all others, is,

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to waive all those questions of formality, and *technicality*, that otherwise might have been insisted on, and transfer the matters to a different tribunal, which only takes cognizance of the merits of the controversy. The question of jurisdiction is determined by statute; and the statute has determined this mode of *trial*; there is nothing, therefore, in this view of the case, inconsistent with the general doctrine,—that *this question never comes too late*.

3. In the next place, we regard this question as having been, in effect, passed upon, and as not being entirely an open question. In the case of *Eddy v. Sprague*, 10 Vt. 216, which was an action for the warranty of a horse, the referees did not find a warranty, but a deceit. The court sustained the report, although the issue tried by the referees was not the one joined in court, nor one growing out of the declaration. In the case of *Learned v. Bellows*, 8 Vt. 84, the same doctrine is held.

Judgment affirmed.



EATON & SHAW v. HIRAM M. WHITCOMB.

The firm of F. & S. having an account against W., F. sold out his interest in the property and demands of the firm to E., and E. entered into partnership with S., and the business was conducted under the firm of E. & S.; after this, and after E. & S. had ceased transacting business as partners, W. examined his account upon the books of F. & S., and admitted it to be correct, and consented that it might be charged to him upon the books of E. & S., and it was accordingly so charged; and it was held that E. & S. might, in an action on book account in their own names against W., recover the amount thus transferred from the books of F. & S.

In such case, F. & S. having an account against W., S., who was a member of the firm, contracted with W. for a quantity of building materials, to be used by S. in the erection of a house which he was building for himself, and in which the firm of F. & S. had no interest, and agreed that the same, when furnished, should apply in payment of the account which F. & S. then had against W., and that the balance, which should be due for the materials, should be paid in goods out of the store of F. & S. W. knew that F. had no interest in the building on which these materials were to be used, but, relying upon this agreement on the part of S., furnished materials to S. to an amount ex-

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ceeding the amount due from him to F. & S. F. sold out his interest in the property and demands of the firm of F. & S. to E., and E. entered into co-partnership with S., and the business was conducted under the firm of E. & S., and W. consented that the account standing against him on the books of F. & S. should be charged to him on the books of E. & S. W., after he had delivered to S. lumber sufficient to pay the account of F. & S. against him, continued to furnish materials to S., and from time to time, both before and after the firm of E. & S. had commenced, took goods from the store, intending to have them apply in payment for the lumber thus delivered by him to S., and which goods S. delivered to him, also, with the understanding that they were to apply in payment for such lumber. The lumber, &c., delivered by W. to S., was all delivered prior to the formation of the firm of E. & S. None of this lumber was credited on the books of F. & S., or E. & S., and neither F. nor E. was aware but that the account against W., as it stood upon the books, was wholly due from W., they neither of them having any knowledge of the contract between S. and W. And it was held, in an action on book account, brought by E. & S. against W., that the contract thus made by S. was within the scope of his authority, as partner, and that the amount delivered to him by W. must offset against the account of E. & S. against him.

But, it appearing that W. had also delivered to E. & S. lumber &c. which was used for the benefit of the firm, and which was delivered expressly in payment of the account of the firm against him, it was also held that the amount thus delivered must be first offset against the account of the firm, and that then so much of the amount delivered by W. to S., under the above contract, as was necessary to balance the remainder of the account of the firm, should be offset against that account; and that W. was not entitled to recover against the firm any balance, for the property thus delivered to S., above what was necessary to balance the account of the firm, after first applying the items which accrued in express payment of the account of the firm, and of which the whole firm received the benefit.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts found by him as follows.

The plaintiffs presented an account of \$49.65; of which sum \$39.55 was originally an account in favor of the firm of Fuller & Shaw against this defendant, for goods delivered by them to the defendant, while they were partners in the mercantile business. On the 4th day of March, 1842, Thomas H. Fuller, one of the firm of Fuller & Shaw, sold to Horace Eaton, one of the present plaintiffs, all his interest in the goods and demands belonging to the firm of Fuller & Shaw, the account of the defendant being included in the

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sale, and at the same time Eaton entered into partnership with Shaw, and they continued to transact business as merchants, under the firm of Eaton & Shaw, until some time in October, 1842. On the 8th day of October, 1842, soon after the firm of Eaton & Shaw failed in business, Fuller, the former partner of Shaw, being then clerk of Eaton & Shaw, called on the defendant to examine the account against him on the books of Fuller & Shaw. The defendant, after a full examination, made no objection to the account. Fuller then informed the defendant, that he, Fuller, had sold his interest in the defendant's account to Eaton, and that he would charge the same to the defendant on the books of Eaton & Shaw, if he, defendant, had no objection. The defendant then consented and agreed that the account might be so charged, and the charge was made accordingly in the presence of the defendant. At this time the defendant did not inform either Fuller, or Eaton, that he had any claim against Shaw, that ought to be offset against this account of Fuller & Shaw. The defendant admitted, on the trial, that the items in the account presented by the plaintiffs were delivered to the defendant, and were properly charged at the time, but objected to the allowance of the account of Fuller & Shaw to the plaintiffs in this action.

The defendant presented an account against the plaintiffs, amounting in the whole to \$54.07,—of which sum \$8.96 was conceded, by the plaintiffs, to have accrued for the benefit of their firm, and to be properly charged to them; the balance of the defendant's account, being \$45.11, accrued as follows.

The defendant commenced obtaining goods, on credit, at the store of Fuller & Shaw, on the 19th of October, 1841, and so continued until December 8, 1841, at which time the amount against him, on their books, was \$21.24, for which he was liable to pay in money. On that day the defendant made a contract with the plaintiff Shaw, who was then one of the firm of Fuller & Shaw, to furnish to Shaw materials for building a dwelling house for the sole use and benefit of Shaw, and in no way for the benefit of Fuller, the other partner,—which fact was then well known to the defendant,—and Shaw agreed to pay the defendant for said materials, by applying them in payment of the account then against the defendant on the books of Fuller & Shaw, so far as that account would go, and

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to pay the balance, over said account, in goods out of the store of the firm. The defendant, relying on this contract, furnished to Shaw materials to the amount of \$45.11, above specified, all of which were delivered on or before March 1, 1842; and all the materials, so furnished, were used by Shaw, and no part of them went to the benefit of Fuller, or Eaton. The defendant procured the goods charged in the plaintiffs' account after the 3d day of December, 1841, from time to time; by the consent of Shaw, under this contract, intending to have them apply in payment for the materials so furnished, and the goods were delivered by Shaw for that purpose, as well before, as after, Eaton became a partner. The goods so delivered to the defendant were regularly charged on the company books to the defendant; but none of the materials delivered by the defendant were credited to him on said books. Neither Eaton, nor Fuller, was informed of the contract between the defendant and Shaw, nor did they learn the situation of the business until some time in October, 1842; but they both supposed that the goods delivered to the defendant were delivered upon his credit alone, and that the accounts of the parties stood, as they appeared upon the books.

The auditor decided that the sum of \$8.96 of the defendant's account, above specified, of which the firm, as such, had received the benefit, should be offset first against the plaintiffs' account, and that so much of the sum of \$45.11, above mentioned, as would be necessary to balance the remainder of the plaintiffs' account, should also be offset against that account, and that there was nothing due from either party to balance book accounts between them.

Both parties filed exceptions to the report of the auditor; but the county court accepted the report, and rendered judgment for the defendant to recover his cost; to which decision exceptions were taken and filed by both parties.

J. & J. G. Smith and T. Childs for plaintiffs.

1. The articles charged in the plaintiffs' account, which were delivered by Fuller & Shaw to the defendant, can be recovered in this action.

2. The lumber, delivered to Shaw by the defendant, on Shaw's individual account, could not be legally charged to Eaton & Shaw,

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nor can such account be offset against any claim in favor of Eaton & Shaw against the defendant. Shaw could not, without the consent of his partner, receive any property to his own separate use, in payment and discharge of a debt due to the company; neither could he sell goods, belonging to the company, in payment of a private debt against himself, nor for property, which the defendant knew was designed to go, and which did in fact go, to the separate use of Shaw. 5 Cow. 489. 7 Wend. 326. 2 Johns. 500. 1 Wend. 531. 16 Johns. 34.

Smalley, Adams & Hoyt for defendant.

1. The contract between the defendant and Shaw, being without fraud or collusion, was binding on the firm, inasmuch as one partner has the power to sell the partnership effects, and to receive payment therefor in any manner he may see fit, and to release, or discharge partnership debts. *Strong v. Fisk*, 13 Vt. 277. *Fay et al. v. Green*, 1 Aik. 71. *Swan et al. v. Steele et al.*, 7 East. 210.

2. If the agreement, however, should be deemed void, then it is insisted that that part of the plaintiffs' account, which accrued to the firm of Fuller & Shaw, has not been assigned to Eaton & Shaw, so as to make it a legitimate charge on book.

The opinion of the court was delivered by

HEBARD, J. The first question presented is, can the amount of the account in the name of Fuller & Shaw be recovered in this suit? or had the plaintiffs a right to charge it over, and make it a part of their account? This will depend upon the contract of the parties. Without an agreement to that effect, it could not be done; and, by the agreement of the defendant, it might as well be charged as any thing else. The right to recover for every item of charge on book depends upon a contract in relation to the article, express, or implied. That the contract is special has been holden as no objection. That there is a particular agreement, as to the time and mode of payment, has been considered as forming no obstacle in the way of a charge on book; and in the recent case of *Spear v. Peck*, it was held, that an account stated might be charged on book, although the account, out of which the balance was ascertained, was beyond the jurisdiction of the court, to which the action was brought.

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The auditor has found the fact, upon which the plaintiffs' right to charge depends, to wit, that the defendant consented that this account might be charged in the plaintiffs' account against him. This consent, when carried into effect, was in the nature of a contract, by which the defendant agreed, that whatever claim any one had upon him for that account might be prosecuted in the name of the plaintiffs.

The other question depends upon the effect, that is to be given to the contract between Shaw and the defendant, in relation to receiving lumber for what there was due to Fuller & Shaw, and for such goods as he should afterwards take out of the store. It is a general principle of law, that one partner cannot divert the partnership property to his own use. It is also a principle of law, that each partner is the general agent of the firm, in relation to all business within the scope of the partnership. All these general principles are, to some extent, modified by the *custom* and *business habits* of the community. It is usual for merchants to receive in payment all sorts of barter and articles of traffic. The case does not show that the defendant could be supposed to be influenced by any improper motive, at the time he made the contract with Shaw. The case of *Strong v. Fish* was for an existing indebtedness. In this case the defendant actually parted with his property, under a contract made with one of the partners. That Shaw was to use it for his own benefit could make no difference. He might do so, if the amount of the debt were paid to him in money. The principle is settled by the case of *Strong v. Fish* and settled to a point beyond what is contended for in this case.

Judgment affirmed.

WILLIAMS, CH. J., dissenting. I cannot come to the conclusion, to which my brethren have arrived in this case. The plaintiffs, in my opinion, are entitled to judgment for the whole of their account. It is very desirable, that, in all mercantile transactions, in all transactions which respect partners, and bills of exchange, the decisions in the several States should be uniform, and should be in unison with the decisions in Great Britain. The different parties to be affected by them frequently reside in different States and governments, and hence the law in relation to these subjects should

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be the same. In all such transactions I receive as an authority a decision made in any of the neighboring states, unless it contravene some principle previously established here, or is plainly at variance with the principles of the common law. I should therefore receive the decision, which has been read from 7 Wendell 326, *Boorahim v. Ensworth*, as decisive of this question, unless it was in contravention of the principles of the common law. I apprehend, however, that the principles laid down in that case are of known and approved authority in the commercial world, where the common law is recognized.

The power of one partner to bind the firm by any contract of his is restricted to transactions in relation to the business of the firm, and for the benefit of the firm; so far as this, each partner may be considered as the accredited agent of all, and any contracts he may make in the partnership business will be binding on all. The partner may exceed his authority in this particular, and yet bind his co-partner, if the business, about which he contracts, is apparently the business of the firm, and the contrary is not known to the person with whom he contracts. If the person, with whom he transacts business, is ignorant of his want of authority, and is guilty of no fraud, the firm may be bound, upon the same principle that others are sometimes bound by the acts of agents, apparently within the scope of their authority.

But when the transaction has no apparent relation to the partnership business, but is evidently for the private benefit of the partner, and not for the benefit of the company, I apprehend the partners are not bound, unless they have assented to the transaction; and the burden of showing this is upon the person contracting with the individual partner. This principle was laid down by Eyre, Ch. J., in *Ex parte Agace*, 2 Cox 312. "When, from the nature of the business, it is apparent that it is for the separate account and benefit of the individual, it is incumbent on the person dealing to show a previous authority, or subsequent approbation." This was laid down by Lord Eldon, in *Ex parte Bonbonus*, 8 Ves. 540. If a partner attempt to bind a firm in any contract connected with his private business alone, or if he engages in a contract connected with the business, but from which he solely derives the benefit, the firm are not liable, unless from their knowledge and assent to the

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transaction. The former is laid down in the case of *Sandilands v. Marsh*, 2 B. & Ald. 678, and the latter proposition in the case of *Bignold v. Waterhouse*, 1 M. & S. 255. Without multiplying authorities to this point, I will only refer to the cases of *Vere v. Ashby*, 10 B. & C. 288, [21 E. C. L. 79,] and *Jones v. Corbett et al.*, 2 Ad. & El., N. S., 828,—where the principle was recognized, though the decision was upon the insufficiency of the pleas. In the case of *Chazournes v. Edwards*, 3 Pick. 5, the doctrine was distinctly laid down by Ch. J. Parker; and the reporter, in a note, adds, "If, from the subject matter of the contract, or the course of dealing of the partnership, the creditor was chargeable with constructive notice of the fact, that the debt, for which he takes the partnership security, was a private debt of a particular partner, the partnership is not liable;" and, among other cases referred to, is the case from 7 Wendell, to which I have before adverted.

Applying these principles to the facts in this case, I think judgment should be for the plaintiffs. The account in favor of Fuller & Shaw was properly charged to the defendant, as he assented thereto, after the firm of Eaton & Shaw was formed. Before any agreement was made by Shaw and the defendant, there was due the sum of \$21.24, which was payable in cash. The goods, which the defendant received from time to time, were charged, in the usual course of business, to the defendant, and stood on the books of the plaintiffs as a debt due from the defendant, and, after allowing the items which were credited by the plaintiffs upon their books, there remained an apparent balance due to the plaintiffs of \$44.34. This, by the report of the auditor and the judgment of the county court, was absorbed and paid by the account of the defendant for materials found and services rendered for the benefit of Shaw, the other partner, not in any way connected with, or for the business or benefit of, the partners, but solely and exclusively for the private business and benefit of Shaw, in building a house for himself. The agreement, made between the defendant and Shaw, was a private agreement between them, of which neither Fuller nor Eaton had any knowledge, and of which they could not be presumed to have any knowledge, as the defendant was, from time to time, made debtor on the partnership books for every thing he received. To give effect to this agreement is a fraud on Fuller and on Eaton.

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The defendant is to be charged with knowledge, that this was not for the benefit of the firm, or in any business connected with the firm; and, unless he obtained the consent of the other partners, or they had knowledge of the transactions, and did not dissent, he cannot thus extinguish his debt to the firm. If, in the ordinary business of a mercantile firm, articles are received by an individual partner and made use of in his family, the consent of the other partners might be proved, or inferred, and none of the consequences, which have been depicted in the argument, would follow.

Of the case of *Strong v. Fish*, 13 Vt. 277, I can only say, that I had entertained a different opinion in that case in the county court, and the judgment of the county court was reversed. The general principles laid down by the court I readily accede to. The authority of *Fay v. Green*, 1 Aik. 71, was relied on in that case. This point was not made by the counsel, and was passed over by them *sub silentio*. But in both cases stress was laid upon the fact, that there was no fraud, or bad faith. There is a material distinction, in the authority of partners, between two attorneys in partnership and partners in a mercantile transaction. One attorney has no authority to bind his partner by a promissory note; *Hedley v. Bainbridge*, 3 Ad. & El., N. S., 316. One may be the prominent man in all business in court, and the other principally confined to office business. A contract, made with the prominent and known partner, in relation to the management of a cause, and the compensation therefor, might not be a fraud on the other partner, when it would be in a mercantile partnership. I should therefore confine the authority of the case of *Strong v. Fish* to cases similar to that case, and not extend it to a mercantile transaction.

In the present case, I consider the agreement between Shaw and the defendant as not binding on the plaintiffs, as, in a legal sense, a fraud on them, as made without authority and against their consent, and that the defendant must, from the nature of the transaction, have known this want of authority. I should hold him liable for the whole amount of his account, and render judgment on the report for the plaintiffs.

ADDISON COUNTY,

JANUARY TERM, 1845.

[Continued from ante, page 234.]

JOHN BRAINARD v. CALVIN P. AUSTIN.

If the plaintiff sets forth, in declaration, a claim exceeding \$100, and introduces testimony tending to establish it, and it appears that the action was brought in good faith, the plaintiff supposing that a right to recover the claim existed, the county court will not be deprived of original jurisdiction of the case, though it may eventually appear that the plaintiff misjudged as to his right; and it will make no difference, whether the plaintiff's misapprehension of his rights consisted in a mistaken valuation of property, or in a mistaken notion of the law, that was to govern and determine his claim.

INDEBITATUS ASSUMPSIT, for money had and received. Plea, the general issue, and trial by jury.

On trial the plaintiff introduced testimony tending to prove, that, on the first of May, 1839, Apollos A. Buck purchased land of one Miner, for which he gave a note for \$1015, payable to the Farmer's Bank, of Orwell, in three months after date, and signed by the plaintiff as surety,—which note subsequently became the property of Seneca Austin; that soon after the note fell due the defendant called upon Buck for payment of the note; that in November after this the defendant and Buck had a farther conversation in reference to the note, and Buck then paid the defendant \$65.00, and the defendant agreed to wait one year for payment of the note; that soon after this Buck failed in business, and delivered to the plaintiff a large amount of personal property, to secure him for signing the said note; that in January, 1840, the defendant called upon the plaintiff and Buck, and, upon that occasion, the plaintiff gave to the defendant a note signed by himself alone, which was dated August 1, 1839, and was made payable August 1, 1841, for \$1015, with interest annually, and also a note for \$65.00, not on interest, paya-

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ble August 1, 1841, and secured said notes by mortgage; that in March, 1842, the said notes were paid, the plaintiff paying a part and Buck paying a part; as a part of which payment the plaintiff turned out to the defendant notes against third persons to the amount of \$320, for which the defendant allowed \$300. These facts were testified to by the said Buck, who was the only witness introduced on the part of the plaintiff. The said Buck farther testified that the property, delivered by him to the plaintiff, was put into his possession to dispose of, and, with the avails, pay the note to the defendant; but that he refused to pay to the plaintiff the amount of the \$65 note given by the plaintiff to the defendant; that the \$65.00, paid by Buck, and the \$65.00 note, executed by the plaintiff, were for interest over six *per cent.*, on the note for \$1015; and that the plaintiff and Buck had since settled in relation to the amount paid by the plaintiff for Buck, and the property which the plaintiff had received, and that the amount of the \$65.00 note was not taken into the account. No other evidence was introduced on the part of the plaintiff.

Upon this evidence the defendant moved the court to dismiss the action, because the sum which the plaintiff was entitled to recover, if he recovered at all, was within the jurisdiction of a justice of the peace, and not within the original jurisdiction of the county court; but the court refused to dismiss the action.

The counsel for the defendant requested the court to charge the jury,—1, That the plaintiff was not entitled to recover for the \$65.00 paid by Buck upon his note, from his own money;—2, That, if the jury found, from the evidence, that Buck turned out property to the plaintiff to pay the debt which the plaintiff assumed for Buck, and that the plaintiff did pay the \$65.00 note from Buck's property, the plaintiff could not recover;—3, That the payment, by the plaintiff, of the \$65.00 note was, on the evidence introduced by the plaintiff, a payment for Buck, and that Buck, only, could sustain an action to recover for it.

The court did instruct the jury agreeably to the defendant's first and second request; but, as to the point embraced in the third request, charged them, that, if the plaintiff, being holden with Buck to pay the first note for \$1015, was called upon by the defendant to pay said note, and thereupon assumed the debt, and gave a new

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note for the same sum, dated August 1, 1889, and that, to induce the defendant to wait upon him for payment, he executed to him the note for \$65.00 of the same date, and that this last note was for usurious interest, the plaintiff was entitled to recover for that, if he paid it out of his own money, and not out of the money and funds of Buck, and if Buck had in no way accounted to the plaintiff for thus having paid it.

The jury returned a verdict for the plaintiff for sixty five dollars damages, and his costs. Exceptions by defendant.

El. N. Briggs and H. Hale for defendant.

The county court had not jurisdiction of this suit. *Kittredge v. Rollins et al.*, 12 Vt. 541. *Ladd v. Hill*, 4 Vt. 164. *Morrison v. Moore*, 4 Vt. 284. *Putney v. Bellows*, 8 Vt. 272. *Southwick v. Merrill*, 3 Vt. 320.

Linsley and Wicker for plaintiff.

There was no ground for asking the court to dismiss the action. The plaintiff claimed to recover the sum of \$130, with interest, being for \$65.00 extra interest paid by himself, and \$65.00 overpaid on the note for \$1015. He claimed that the \$65.00, paid by Buck, was, by force of law, a payment of so much of the debt, and that, as he was a mere surety, and paid the whole note, on which \$65.00 had been thus paid by his principal, he was entitled, in this action, to recover back such overpayment.

But it was enough, that the action was brought in good faith, and that there was proof going beyond \$100. Besides, this, at most, was a case, where the county court had a discretionary power, and, having exercised it, it cannot be revised in this court. *Morrison v. Moore*, 4 Vt. 284. *Spafford v. Richardson*, 12 Vt. 224. *Ladd v. Hill*, 4 Vt. 164.

The opinion of the court was delivered by

HERARD, J. The only question in the case is as to the jurisdiction of the county court. The question of jurisdiction, under the provision of our statute, is one of some difficulty. The amount of the plaintiff's claim is made the *criterion*, and yet that does not always determine it; for his claim may be *fictitious*, affording no reasonable ground

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of belief, that he will be entitled to recover it. It does not depend upon the amount that he actually recovers,—for repeated decisions have sustained the jurisdiction of the county court, when the plaintiff's demand, that he was legally entitled to recover, was much less than one hundred dollars. There have been some general rules adopted in relation to this question.

In actions *ex contractu*, if the sum in demand is mere matter of computation, and that does not amount, by computation, to one hundred dollars, the county court have no jurisdiction. If it is not strictly matter of computation, but the basis of the claim, as set forth in the declaration, shows that less than one hundred dollars is due, there is a want of jurisdiction. When the claim sounds in damages, or depends upon the value of property, whether the action is *ex contractu*, or *ex delicto*, if the plaintiff introduces no testimony, which tends to establish a claim exceeding \$100.00, the county court have no jurisdiction. But in any or all of these cases, if the plaintiff sets up a claim exceeding \$100, and introduces testimony tending to establish it, and it appears that the action was brought in good faith, the plaintiff supposing that a right to recover the claim existed, the jurisdiction of the court will not be ousted, though it may turn out that the plaintiff misjudged as to his right; and it will make no difference, whether the plaintiff's misapprehension of his rights consisted in a mistaken *valuation* of property, or in a mistaken notion of the law, that was to govern and determine his claim.

In this case, by the finding of the jury, under the ruling of the court, the plaintiff was entitled to recover, and did recover, \$65.00. There was another sum of \$65, which he would have been entitled to recover, if the court had understood the law to be as he then contended, and now claims it to be. The testimony tended to show that the plaintiff signed a large note, as surety for Buck; that, after said note fell due, Buck paid \$65, extra interest; that, soon after that, Buck failed, and the plaintiff assumed the whole debt,—which he afterwards paid,—some part with funds furnished by Buck, and part with his own means. The plaintiff now claims, that, as in equity that \$65 usurious interest should have gone in payment of the principal, by giving it that application, it would have lessened the sum, that the plaintiff had ultimately to pay, and that therefore it was, in effect, a payment made by the plaintiff, and should have

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been added to the sum, that he did recover,—making a sum within the jurisdiction of the county court. It is not to be denied, but what there is some plausibility in that notion, although this court have not been quite able to discover the soundness of the reasoning.

But the question is, in the next place, was this claim made in good faith?—for if it was, the county court did right in retaining the action. And whether it was made in good faith was a question addressed to the sound discretion of the county court, and is not to be revised by this court, unless the bill of exceptions presents some statement of facts, in relation to the action of that court upon that view of the case, by which we can be satisfied that the discretion was not properly exercised; and we are not prepared to say that the county court did not exercise a good discretion in that particular.

Judgment affirmed.



CALVIN P. AUSTIN v. SOLOMON HOWE.

A decree of foreclosure, by a court of chancery, cannot be proved by the docket minutes of the court, merely; the decree itself, as drawn up and signed, or a copy of the record, if it have been enrolled, is the only legitimate evidence of the decree.

It is no defence to an action on note, that the note was secured by mortgage, and that the mortgagee has obtained a decree of foreclosure, if he have not enjoyed the premises, nor taken, nor attempted to take, possession of them.

ASSUMPSIT upon a promissory note. Plea, the general issue, and trial by the court.

On trial the execution of the note by the defendant was conceded, and the defendant then offered evidence tending to prove that the note declared upon, with several others, was secured by a mortgage of certain premises, and that the plaintiff, in the name of one Seneca Austin, brought his bill of foreclosure to the court of chancery for Addison county, on said mortgage, and that said bill, at the June term of said court, 1843, was taken as confessed, and was referred to a master on the 18th day of June, 1843, to ascertain and report the sum due in equity, who made his report June 20, 1843, showing

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the sum due; also the docket minutes of said court, showing at what time the different payments were to be made; also evidence tending to prove that the first payment, specified in the docket minutes, was never made, and that the premises described in the bill of foreclosure and mortgage were of sufficient value to pay all the notes, which were described in said mortgage, and that said premises were timber lands, and uncultivated. It appeared, that no decree, in form, had ever been made and signed, or enrolled, in the case. The court refused to admit the evidence offered and rendered a judgment for the plaintiff, for the amount of the note declared upon. Exceptions by defendant.

Linsey and Wicker for defendant.

Briggs & Williams for plaintiff.

The opinion of the court was delivered by

HEBARD, J. This was an action upon a promissory note, and the defence is, that the note, with others, is secured by mortgage; and that a bill of foreclosure has been brought upon that mortgage, and that the bill was taken as confessed, and was referred to a master, who, on the 20th of June, 1843, made report of the sum due, which report was ordered to be filed in the court of chancery, together with the docket minutes of the clerk, in relation to the time when the several sums were to be paid. The defence goes upon the ground, that a decree has been made in the case, fixing upon the time when the different sums should be paid, and that the decree has not been complied with, and that the premises have become vested in the orator in that bill.

We, in the first place, think that there was no such evidence of any decree offered, as the court would have been justified in regarding. If there was any decree, it must be proved in the proper way. The decree itself, as drawn up and signed, or a copy of the record, if it have been enrolled, would be the only legitimate evidence of the decree. We therefore think, clearly, that, as the premises have not been enjoyed by the orator, and no possession had been taken, or attempted to be taken, by him, the defence that was offered could not avail the defendant.

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It would seem to be unnecessary to take much time in disposing of this case, after having said thus much; for we think that the law upon this point is fully and correctly set forth in the case of *Lovell v. Leland*, 3 Vt. 591; and that case falls short of sustaining the defence, that was attempted to be made in this case.

Judgment affirmed.



MILTON JUNE AND WIFE v. JOHN A. CONANT.

In an action of trespass on the freehold, brought before a justice of the peace, the writ must be made returnable in the town where one of the parties resides, if both parties are citizens of this State; and the writ will abate, if made returnable in the town where the land lies, if neither of the parties resides in that town. In this respect section 16 of chapter 26 of the Revised Statutes, respecting process, does not control section 14 of chapter 26, which specifies where writs, in actions before a justice of the peace, shall be made returnable.

TRESPASS quare clausum fregit. The premises, upon which the injury was committed, were described in the declaration as situated in the town of Leicester, in the county of Addison, and the writ was made returnable in said Leicester, before a justice of the peace of the County of Addison. The plaintiffs and defendant were described in the writ as residents of the town of Brandon, in the county of Rutland.

The action came to the county court by appeal; and the defendant pleaded,—as he had pleaded on the trial before the magistrate,—that the justice of the peace, before whom the writ was made returnable, and who tried the suit, had not jurisdiction of the same, for the reason that all the parties to the suit were residents of Brandon, in Rutland County. The plaintiffs replied that the trespasses complained of were committed upon their close, situated in Leicester, in the county of Addison, and not elsewhere. To this replication the defendant demurred.

The county court held that the replication was insufficient, and that the plea was sufficient, and rendered judgment for the defendant, for his costs. Exceptions by plaintiff.

June et ux. v. Conant.

E. N. Briggs for defendant.

The Revised Statutes relative to justices of the peace, chap. 26, sect. 14, must determine the question raised in this case. The action of trespass on the freehold is made local, only when brought before the Supreme or county court. Rev. St., c. 28, §11. This is a statute regulation. *Hunt et ux. v. Pownal*, 9 Vt. 417.

Linsley and Wicker for plaintiffs.

1. The fourteenth section of the justice act, Rev. St. 171, insisted on by the defendant, is expressly, and by its terms, confined to those cases, where there is no other provision of law inconsistent with it. That section, therefore, leaves the question open, to be controlled by any general principle of law applicable to the subject. The eleventh section of chapter 28 of the Revised Statutes, it is believed, establishes the rule applicable to this case.

2. If the statute is silent upon the subject, then we insist that the action, being local at common law, must be brought in the county where the land lies. 3 Bl. Com. 294. *Lienow v. Ellis*, 6 Mass. 331.

The opinion of the court was delivered by

HEBARD, J. This was an action of trespass upon land of the plaintiffs lying in the town of Leicester and County of Addison. The parties both reside in Brandon in the County of Rutland. The suit was brought before a justice, and the court was held in Leicester. The defendant pleaded in abatement the above facts, to the replication to which plea, which alleged that the *locus in quo* was in Leicester, the defendant demurred. The only question is, whether this suit should have been brought in Brandon, where both parties reside.

The statute provides, that "suits before a justice must be made returnable within the town, where one of the parties reside, if either party resides in this state,—unless otherwise specially ordered. By the 16th sec., chap. 28, of "Process," it is provided, that every action, or suit, before the county or supreme court, shall be brought, tried and determined in the county, in which one of the parties resides, if either resides in this state; otherwise the writ, on motion, shall abate; if neither party resides in this state, the suit may be brought in any county in the state; but all actions of ejectment and

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for trespasses committed on the freehold shall be brought in the county, in which the land lies." This provision is for suits brought to the county court, and can have no qualifying effect upon the provision in the Justice act. There is nothing conflicting between the two provisions of the statute. For county courts there is but one place in the county for holding courts; not so with justice courts.

The action being local at common law will not help to remove the difficulty, so long as the statute is explicit on the subject. *Pitman v. Flint*, 10 Pick. 504.

Judgment affirmed.



STATE v. WILLIAM P. HOOKER.

An indictment, which alleged, in the first count, that the respondent made an assault upon one Smith, the said Smith "then and there being sheriff of said county of Addison," and which charged him, in the second count, with having "hindered and impeded a civil officer, under the authority of this State, to wit, Adnah Smith, sheriff of the county of Addison aforesaid," and which alleged, in both counts, that the said Smith was, at the time, in the "execution of his said office," was held to allege, with sufficient certainty, in both counts, that said Smith was sheriff of Addison county.

And if it be alleged, in such indictment, that the sheriff, at the time of the said assault and impeding, had in his hands a writ of execution against the respondent, which issued on civil process, and that he was about to execute the same by arresting thereon the body of the respondent, it is not necessary to allege that he had demanded of the respondent payment of the sum due on the execution.

And where it was alleged in the indictment, in such case, that the execution was dated the 27th of September, and that it was delivered to the sheriff, while it was in full life, on the 6th day of October, and that it was attempted to be served on the 7th day of November, and that it was made returnable in sixty days from its date, it was held that it sufficiently appeared that the execution was delivered to the sheriff within sixty days after its date, and that the sheriff attempted to execute it within its life.

And the allegation that the said Smith was in the execution of his duty as sheriff, and that, for want of property, on which to levy the execution, he attempted to serve and execute said writ of execution, as he was therein

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commanded, by arresting the body of the respondent, and that the respondent then and there, well knowing that said Smith was sheriff of the county of Addison, and that he then and there had said writ of execution to serve and execute and was then and there attempting to serve and execute the same, did then and there impede and hinder the said Smith, while attempting to serve and execute said writ of execution, was held as sufficiently averring that the sheriff had the execution in his hands at the time the resistance was made.

And it is unnecessary to allege, in such indictment, the *place*, at which the execution was delivered to the sheriff.

And, after a general verdict of guilty, it is no objection to the indictment, on motion in arrest, that offences of different grades, and requiring different punishments, are charged in the different counts. If any one or more of the counts are sufficient, the court will render judgment upon such counts; and if all the counts are sufficient, judgment will be rendered upon the count charging the highest offence.

If a hearing be had before a magistrate, upon the complaint of a town grand juror charging a person with the commission of a crime, and the respondent be, by the magistrate, bound over for trial by the county court, and an indictment be found against him, and, before a trial is had upon the indictment, a witness, who testified before the magistrate, dies, evidence may be received, on trial upon the indictment, to prove what that witness testified before the magistrate.

And it is not necessary, on such trial, to prove the exact language used by the witness in giving his testimony before the magistrate; it is sufficient, if the substance of his testimony, as there given, be detailed.

If a sheriff, in attempting to execute a writ of execution, on civil process, which is delivered to him to be levied, break open the outer door of the dwelling house of the execution debtor, where the debtor then is, with a view of arresting the body of the debtor on the execution, such act is unlawful; and if, after the sheriff has entered the house, the debtor forcibly resist the attempt of the sheriff to arrest him, and commit an assault and battery upon the sheriff, an indictment will not lie against the debtor for so doing.

INDICTMENT for an assault and battery upon a sheriff, and impeding him in the execution of the duties of his office. The indictment was in these words.

"State of Vermont, Addison County, ss. Be it remembered, that, at a term of the county court, begun and holden at Middlebury, within and for said county of Addison, on the second Tuesday of June, A. D. 1843, The Grand Jurors within and for the body of the

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for trespasses committed on the freehold shall be brought in the county, in which the land lies." This provision is for suits brought to the county court, and can have no qualifying effect upon the provision in the Justice act. There is nothing conflicting between the two provisions of the statute. For county courts there is but one place in the county for holding courts; not so with justice courts.

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And if it be alleged, in such indictment, that the sheriff, at the time of the said assault and impeding, had in his hands a writ of execution against the respondent, which issued on civil process, and that he was about to execute the same by arresting thereon the body of the respondent, it is not necessary to allege that he had demanded of the respondent payment of the sum due on the execution.

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commanded, by arresting the body of the respondent, and that the respondent then and there, well knowing that said Smith was sheriff of the county of Addison, and that he then and there had said writ of execution to serve and execute and was then and there attempting to serve and execute the same, did then and there impede and hinder the said Smith, while attempting to serve and execute said writ of execution, was held as sufficiently averring that the sheriff had the execution in his hands at the time the resistance was made.

And it is unnecessary to allege, in such indictment, the *place*, at which the execution was delivered to the sheriff.

And, after a general verdict of guilty, it is no objection to the indictment, on motion in arrest, that offences of different grades, and requiring different punishments, are charged in the different counts. If any one or more of the counts are sufficient, the court will render judgment upon such counts; and if all the counts are sufficient, judgment will be rendered upon the count charging the highest offence.

If a hearing be had before a magistrate, upon the complaint of a town grand juror charging a person with the commission of a crime, and the respondent be, by the magistrate, bound over for trial by the county court, and an indictment be found against him, and, before a trial is had upon the indictment, a witness, who testified before the magistrate, dies, evidence may be received, on trial upon the indictment, to prove what that witness testified before the magistrate.

And it is not necessary, on such trial, to prove the exact language used by the witness in giving his testimony before the magistrate; it is sufficient, if the substance of his testimony, as there given, be detailed.

If a sheriff, in attempting to execute a writ of execution, on civil process, which is delivered to him to be levied, break open the outer door of the dwelling house of the execution debtor, where the debtor then is, with a view of arresting the body of the debtor on the execution, such act is unlawful; and if, after the sheriff has entered the house, the debtor forcibly resist the attempt of the sheriff to arrest him, and commit an assault and battery upon the sheriff, an indictment will not lie against the debtor for so doing.

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"State of Vermont, Addison County, ss. Be it remembered, that, at a term of the county court, begun and holden at Middlebury, within and for said county of Addison, on the second Tuesday of June, A. D. 1843, The Grand Jurors within and for the body of the

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County of Addison, now here in court duly impaneled and sworn, upon their oath present, that William P. Hooker, of Middlebury aforesaid, at Middlebury aforesaid, on the seventh day of November, in the year of our Lord one thousand eight hundred and forty two, with force and arms, in and upon one Adnah Smith, in the peace of God and of this State then and there being, and then being sheriff of said county of Addison, and in the due execution of his said office, then and there did make an assault, and him, the said Adnah Smith, so being in the due execution of his said office, aforesaid, then and there did hinder and impede, and then and there did beat wound and ill-treat, and other wrongs to the said Adnah Smith then and there did, to the great damage of the said Adnah Smith and against the peace and the dignity of the State.

And the Grand jurors aforesaid, on their oaths as aforesaid, do farther present, that the said William P. Hooker, at Middlebury aforesaid, on the seventh day of November, in the year of our Lord one thousand eight hundred and forty two, with force and arms, wilfully and knowingly did impede and hinder a civil officer, under the authority of this State, in the execution of his office, to wit, Adnah Smith, sheriff of the county of Addison aforesaid, in the peace of God and this State then and there being, in then and there serving and attempting to serve and execute a legal writ of execution, to wit, a *pluries* writ of execution, regularly issued on a judgment rendered by the Honorable County Court in and for said county of Addison, at a term of said court begun and holden at Middlebury, in and for said county of Addison, on the second Tuesday of June, A. D. 1842, said execution dated the 27th day of September, A. D. 1842, and signed by Samuel Swift, clerk of said court, and directed to any sheriff or constable in the State, and made returnable in sixty days from the date thereof, whereby, after reciting that Harry Goodrich of said Middlebury, by the consideration of the county court begun and holden at Middlebury, in and for said county of Addison, on the second Tuesday of June, A. D. 1842, recovered judgment against the said William P. Hooker and one Charles Hooker in an action of trespass, (the cause of which action it was adjudged by said court arose from the wilful and malicious act of the defendants,) in the sum of three hundred and forty one dollars and fifty six cents, damages, and for the sum of thirty two dollars

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and seventy cents, costs of suit, whereof execution remains to be done for the sum of \$307.70, said officer, as often before commanded, is therefore, by virtue of said writ of execution, by the authority of the state of Vermont, commanded to cause to be levied, of the goods, chattels, or estate of the said William P. Hooker and Charles Hooker, said sum of \$307.70, with 25 cents more for said writ of execution and 50 cents for two others, and, for want of the goods and chattels of said William P. and Charles, shewn or to be found by said officer within his precinct, commanding him to take the bodies of said William P. Hooker and Charles Hooker, and them commit to the keeper of the common jail in Middlebury, in said county, within said prison, which said writ of execution, so duly issued as aforesaid, in full life, and in no way satisfied, paid, or discharged, was, on the 6th day of October, A. D. 1842, delivered to said Adnah Smith, sheriff as aforesaid, to serve and return, and afterwards, to wit, on the seventh day of November, A. D. 1842, at Middlebury aforesaid, the said Adnah Smith, then being sheriff, as aforesaid, for want of the goods, chattels, or lands of the said William P. and Charles, shown him or to be found within his precinct, whereon to levy said writ of execution, attempted to serve and execute said writ of execution, as he was therein commanded, by arresting the body of said William P. Hooker; and the said William P. Hooker then and there, unlawfully and wickedly intending to impede and hinder the said Adnah Smith in the execution of his said office, and well knowing that said Adnah Smith was sheriff of the county of Addison as aforesaid, and that said Adnah Smith then and there had said writ of execution, so duly issued and in full force as aforesaid, to serve and execute, and was then and there attempting to serve and execute said writ of execution, did, with force and arms, then and there impede and hinder the said Adnah Smith, sheriff as aforesaid, in attempting to serve and execute said writ of execution, in the execution of his said office, by beating and bruising the said Adnah Smith with a large and heavy bludgeon on his head, shoulders and arms, to the great damage of the said Adnah Smith, to the great hindrance and obstruction of justice, and contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State."

The indictment also contained a count for a common assault upon

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the said Smith, and also a count for an assault and battery committed upon one George W. Church. Plea, not guilty.

On trial the counsel for the prosecution gave in evidence the record of the justice of the peace, who held the court of inquiry, and by whom the respondent was bound over for trial by the county court, and proved that Adnah Smith, the sheriff, was a witness, duly sworn, and that he testified before the magistrate, on said examination, and that he was also cross-examined by the respondent, and that he had since died; and the said justice was called as a witness, to prove what was the testimony of said Smith before him, at said court of inquiry. The justice, upon inquiry, stated that he could not give the precise language of the witness, but only the substance of his testimony, as given upon the examination in chief and the cross-examination. The respondent objected to the examination of the justice, under such a state of facts, as to the testimony of Smith; but the court overruled the objection and admitted the testimony.

It appeared, from the testimony, that on the 7th day of November, 1842, Adnah Smith, then being sheriff of Addison county, had in his hands, as sheriff, the writ of execution described in the indictment, to serve and return according to law, and that, on the evening of the same day, he went, with some assistants, among whom was George W. Church, to the dwelling house of the respondent, for the purpose of making service of the writ of execution upon the respondent by arresting his body; that, upon their arrival at the house, they found the outer door fastened, and the respondent and his family within, and, after some short delay, and some conversation with the respondent's wife, the sheriff, not succeeding in inducing her to open the door for him, burst open the door by bending or wrenching off the latch, with which it was fastened, and thereupon went into the house, with his assistants, against the will of the respondent, with the intent and for the purpose of arresting the respondent upon said execution; that, soon after the sheriff had thus entered the house, and after some little conversation with the wife of the respondent, the sheriff became satisfied that the respondent was in the chamber, and he thereupon opened the chamber door and informed the respondent that he had an execution against him and wished him to come down and surrender himself upon it, and this he repeated several times, but received no reply; that, soon after

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this, Smith attempted to ascend the chamber stairs, in order to arrest the respondent, and, while ascending, the respondent struck him violently with a large club upon his head, so as to make him fall back to the foot of the stairs; that, soon after, at the request of Smith, George W. Church attempted to ascend the stairs in pursuit of the respondent, and he also received a violent blow upon the head from the respondent, and was, by its force, driven back; that thereupon Smith and Church attempted to ascend the stairs together, in order to arrest the respondent, and the respondent again struck Smith with a club, but they succeeded in ascending the stairs and arresting the respondent; and that, after the respondent had been once taken, he made no farther resistance, and was committed to jail upon the execution.

The court charged the jury, that, though the sheriff had no right to break open the outer door of the respondent's dwelling house, in order to arrest him on the execution, and though the sheriff thereby made himself liable to an action of trespass on the freehold, yet that, being once within the house, if he proceeded after this to arrest the body of the respondent on the execution, and the respondent with force resisted him, while in the execution of his office, and while attempting to arrest him on the execution, they would find the respondent guilty. The jury were also told, that they must take the law of the case from the court, and follow their instructions, in that particular, as their rule.

The jury returned a general verdict of guilty. After verdict the respondent filed a motion in arrest of judgment, which was overruled by the court. Exceptions by respondent. The exceptions were allowed, the sentence respited, and the cause passed to the Supreme Court.

E. D. Barber for respondent.

I. The court erred in admitting the testimony of the justice, by whom the court of examination was held, as to what the deceased witness testified at said court;—

1. Because he could not give the language of the witness; 1 Stark. Ev. 261-2, 280; 2 Russ. on Crimes 683; 1 Phil. Ev. 200, 274; 4 T. R. 290; 3 C. & P. 387; *Melvin v. Whiting*, 7 Pick. 81.

2. Because it was not given on a *trial* between the same parties,

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but upon a mere hearing to determine whether the respondent should be held for *trial*. 1 Chit. Cr. Law 81-2, n. c.

II. The court erred in their charge in relation to the validity of the arrest, made by the officer after a breach of the outer door of the respondent's dwelling house, for the purpose of making the arrest. The principal authorities, which have any tendency to support the doctrine contained in the charge, are believed to be the following; 18 Edw. IV, 4; *Somayne's Case*, 5 Co. 93; Bac. Abr., Sheriff, N 3; *Lee v. Gansel*, Cowp. 1; Dalt. Sheriff 353; 1 Back. Sheriff 129; *Hemenway v. Saxton*, 3 Mass. 232; *Widgery v. Haskell*, 5 Mass. 155; *State v. Miller*, 12 Vt. 437. From an examination of these authorities, it appears that nearly all of them relate to the execution of goods, and not to the arrest of the body, and are grounded upon the authority of a case in the Year Book, 18 Edw. VI, 4, and a reference to that authority in 5 Co. 93. It would seem, however, that the case in the Year Book is not authority, to sustain even the doctrine, that an execution of a *f. fa.*, after a breach of the outer door of a dwelling house, is good. Yelv. 29, Metcalf's Ed. note 1; *People v. Hubbard*, 24 Wend. 369; *Curtis v. Hubbard*, 4 Hill 487; 12 Pick. 270. In Bac. Ab., above cited, it is, indeed, said in the text, that the execution of a *capias*, or *f. fa.*, would be good; but in the note this is doubted, and the "modern practice," it is said, "in some cases, is, to discharge such execution on complaint by affidavit, and to grant an attachment against the officer;" and the case of *Yeates v. Delamaque*, in Trinity term, 17 Geo. III, in the court of exchequer, is cited in support of the doctrine of the note. The case in Cowper, although an application to discharge the defendant from prison, on the ground of an illegal arrest, made after breaking into the apartment where he lodged, turned entirely on the ground that the door broken was not an outer door. The case in Dalton's Sheriff is the same as 18 Edw. IV. 4. In Backus' Sheriff the authority cited is 5 Co. 93, which contains a mere reference to 18 Edw. IV, 4. The cases in the 3d & 5th Mass. were attachments of goods. The case in the 12 Vt. merely decides, that the owner of personal property may not resist, by personal violence; an officer, who attempts to attach such property as the property of another. These authorities seem, therefore, to fail

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entirely of sustaining the doctrine, that the execution of a *fi. fa.*, made after breaking into the debtor's dwelling house, is good.

But, whatever may be the law on that point, we contend that an *arrest*, made under the circumstances of this case, is void; and that the party arrested is justified in resisting the officer in making it. The old maxim of the law is, that "every man's dwelling house is his castle," and that the outer doors thereof cannot be broken, for the purpose of executing civil process. It makes the dwelling house of every individual in community a "privileged place," and the place affords protection to the occupant and his family. It is not, therefore, simply the breaking the outer door, or window, which is prohibited, but it is the invasion of the man's sanctuary. The following authorities are cited in support of the rule, for which we contend. 1 Chit. Cr. Law 54-5; Yelv. 29, note 1, above cited; Cowp. 1; 2 Back. Sheriff 460, *addenda*; Bac. Ab., above cited; 11 Pick. 379; *Ilsey v. Nichols*, 12 Pick. 270; 24 Wend. 369; 4 Hill 337; 1 Russ. on Crimes 520; Smith's Leading Cases 109, *Senayne's Case* 5 Co. 93, and notes; 8 Vt. 424; *Chipman v. Bates*, 16 Vt. 51; Rev. St. 74, §§ 17, 18.

The decisions in analogous cases are entirely inconsistent with the doctrine of the charge. The law can only secure the subjects of it from abuse, by making every thing accomplished by its abuse void, and leaving the party abusing it in the same situation; as if he had no authority, and was acting as a private individual. *Bagshaw v. Gaward*, Yelv. 96, & cases there cited; Bac. Ab., Trespass B, and Sheriff N, 3; *Ex parte Wilson*, 1 Atk. 152; *Loveridge v. Plaistow*, 2 H. Bl. 29; *Luttin v. Benin*, 11 Mod. 51; *Birch v. Prodger*, 4 B. & P. 135; *Atkinson v. Jameson*, 5 T. R. 25; *Wells v. Gurney*, 8 B. & C. 769; Yelv. 29, & cases cited in note; 13 Johns. 414; 8 T. R. 187; 4 Pick. 249; 10 Johns. 253, 369; Smith's Leading Cases 120.

III. The motion in arrest of judgment should prevail.

First, Because the first and second counts are insufficient, as counts for impeding an officer; 8 Vt. 424; 3 Vt. 110; 1 Chit. Cr. Law 223. They are good only for an assault at common law; 8 Vt. 424.

Second, Because the second count is bad, as a count for impeding an officer.

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1. It is not alleged directly that Adnah Smith was sheriff of Addison county. 1 Chit. Cr. Law 171-2, 199.

2. It is not alleged that the sheriff had demanded the sum required by the execution to be levied of the respondent, or that the respondent had refused to pay said sum on such demand, or expose personal property sufficient to satisfy it.

3. It is not alleged, that, at the time of the resistance by the respondent, the sheriff was in the execution of his office, or was executing his process. 2 Hale's P. C. 354, § 110; 1 Chit. Cr. Law 281-2.

4. It is not alleged, that the execution was delivered to the officer within sixty days after the date thereof.

5. It is not alleged that the sheriff attempted to execute the said execution within the life of the same.

6. It is not alleged, that, at the time of the resistance on the 7th of November, 1842, the sheriff had the execution in his hands.

7. It is not alleged that the execution was delivered to the officer at any place. *State v Bacon*, 7 Vt. 219; 2 Hale's P. C. 344, § 77; 1 Chit. Cr. Law 196-8.

None of these defects are cured by verdict. 1 Chit. Cr. Law 661; 2 Hale's P. C. 355.

Third, The judgment must be arrested generally;—because, the verdict being general, and the offences described in the different counts being of different grades and requiring different punishments, no judgment can be rendered on the verdict. 3 T. R. 103; 1 Chit. Cr. Law 254, 637-8, 641.*

O. Seymour, State's Attorney.

The two first counts in the indictment are sufficient. The first is substantially according to well established forms for an indict-

*The counsel for the respondent also argued, very fully, the question arising upon that portion of the charge of the court, in reference to the right of the jury to judge of the law as well as the facts in the case, and the same question was very elaborately examined in the opinion of the court; but, inasmuch as all the members of the court were not present, and those present were divided in opinion upon the point, and no decision whatever was announced in reference to it, it has been deemed advisable by the learned judge, who delivered the opinion, not to publish that portion of it which related to this subject.

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ment at common law for an assault and impeding an officer in the execution of his duty; and the second count fully and sufficiently charges the statute offence. 8 Vt. 424, and cases there cited.

The indictment is not deficient by reason of misjoinder of offences. The several counts simply set forth the same transaction in different ways, which is no ground of demurrer, or motion in arrest. 1 Chit. Cr. Law 249, 250.

The evidence of what the deceased witness, Adnah Smith, testified at the court of examination was properly admitted. Greenl. on Ev. 195, 196. 12 Vt. 437.

The fact that the officer was guilty of a trespass, in opening the outer door of the respondent's house against his will, affords no justification for the assault and impeding the officer, when he subsequently attempted to arrest the respondent on the execution against him. *Semayne's Case*, 5 Co. 93; 1 Chit. Cr. Law 56; 1 East's P. C. 323; 12 Vt. 437.

The opinion of the court was delivered by

HEBARD, J. A great variety of questions have been argued in this case; and we shall first dispose of those, that have arisen upon the motion in arrest.

In the first place, it is said that the indictment does not allege that Adnah Smith was sheriff of Addison county. In the *first* count the respondent is charged with having made an assault upon Smith, then and there being sheriff of said county of Addison. In the *second* count he is charged with having hindered and impeded a *civil officer*, under the authority of this State, to wit, Adnah Smith, sheriff of the county of Addison aforesaid; and in both counts Smith is alleged to have been in the execution of his said office. We think this is a sufficient allegation, that Smith was sheriff; the allegation in the second count, though not expressed with as much *nicety of diction* as the fact was susceptible of, is still direct, and in no way equivocal.

The next objection is, that it is not alleged that the sum due on the execution had been demanded of the respondent, or that he had refused to pay it. This was not necessary to be done. It was a sufficient demand, when he was there with the execution, claiming of the respondent that he surrender himself upon it. If the respon-

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dent, for want of such demand, could not sustain an action for false imprisonment against the officer, then the want of such demand would not justify resistance to the officer, when *making the arrest*; and, consequently, it was not necessary to allege that a demand had been made.

It is farther objected, that it is not alleged that the execution was delivered to the officer within sixty days after its date; nor that the officer attempted to execute it within its life. The indictment alleges that the execution was dated the 27th of September, 1842, that it was delivered to the sheriff, while it was in full life, on the 6th day of October, 1842, that it was attempted to be served on the 7th day of November, 1842, and that it was made returnable in sixty days from date. *Id certum est, quod reddi certum potest*. That it might have been proved that it was delivered on some other day makes no difference; the allegation is direct, and the day alleged will stand for the true day, until some other is proved.

It is farther objected, that there is no allegation that the sheriff had the execution in his hands, at the time the resistance was made, on the 7th of November, 1842. It is alleged that he was in the execution of his duty as sheriff, and that, for want of property, on which to levy the execution, he attempted to serve and execute said writ of execution, as he was therein commanded, by arresting the body of the said Hooker, and that the said Hooker, then and there well knowing that said Smith was sheriff of the county of Addison, and that he then and there had said writ of execution to serve and execute, and was then and there attempting to serve and execute the same, did then and there impede and hinder the said Smith, while attempting to serve and execute said writ of execution. All these allegations, taken together, though not in terms, fully amount to the allegation, that the sheriff had the execution in his hands. How could he be in the execution of his duty as sheriff, and how could he be attempting to *serve this* execution, unless he had it in his hands?

Another objection, though not much relied on, is, that no *place* is alleged, at which the execution was delivered to the sheriff. The place where the execution is delivered is immaterial; the place where it is to be executed is important; and the time when it was delivered is material,—for the validity of the execution in some de-

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gree depends upon that. But it is not necessary to allege where the execution is delivered, for, if the officer has it in his possession in his precinct, it is of no importance whether he received it there, or in some other place.

It is farther insisted, that the indictment is insufficient to sustain a judgment upon this general verdict, because different grades of offences are charged in the different counts, requiring different punishments. The verdict being general, it is to be understood, that the jury found the respondent guilty upon all the counts; and if any one or more of the counts is sufficient, the court will render judgment upon such as are good; if all are good, then judgment will be rendered upon the count charging the highest offence. Such is the authority of the case of *State v. Downer*, 8 Vt. 424.

This briefly disposes of all the questions in relation to the *sufficiency of the indictment*.

The next question to be noticed is the one in relation to the testimony of the *magistrate*, who held the court of inquiry, in relation to what the deceased witness, Smith, testified before him. There are two objections to this testimony. The first is, that the testimony of Smith was not given in the same case, as the one in which the magistrate testified. That it was between the same parties cannot be doubted. The proceedings before the magistrate were in the name of the State against the respondent. That the subject matter of the complaint before the magistrate and the indictment, upon which the respondent was tried, are *identical* is admitted. The complaint before the magistrate, and the holding to bail, is a mode provided by statute for commencing proceedings; and although the hearing before the magistrate is not *technically* a trial, still the proceedings are *compulsory* and *adversary*, the witnesses are compelled to attend and sworn to testify, and, upon the *sufficiency*, or *insufficiency*, of the proof, the accused is either set at liberty, or required to give bonds for his appearance at the *county court*, to take his trial upon the facts set forth against him. The hearing before the magistrate and the trial before the county court are therefore in the same case, and are only distinguishable, in this respect, from a civil trial, by the mode of proceeding which the statute has provided.

The other objection is, that the magistrate could not give the

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words of the deceased witness. If this objection is to prevail, it is doubtful whether the testimony of a deceased witness could ever be used; for it is hardly to be supposed that it would ever so happen, that the words of the witness could be repeated, as he spoke them. This testimony is to be received like other testimony, subject to *criticism* and *remark*; and the less accurate and precise the witness is, in giving this testimony, the less credit it should gain with the jury. This testimony must come like all other. If the witness is conscious of having omitted any important part of the testimony, or if that fact should be made to appear in any other way, the jury may reject the whole of the testimony, as being unsatisfactory;—but for this the court cannot reject it.

We are next to inquire in relation to the charge of the court. Upon this two objections have been urged. The first is, in relation to what the court told the jury, as to the respondent's right to resist the sheriff, after he had made a forcible and tortious entry into the respondent's house.

The case finds that the sheriff went to the respondent's house with a legal process, for the purpose of serving it upon him, and found the *outer* door fastened, and, not succeeding in having the door opened, that he burst it open by wrenching off the latch. The court told the jury that the sheriff had no right to break open the outer door, and that for so doing he was a *trespasser*, but that, if, after he had thus effected an entry into the house, he proceeded to arrest the respondent, the respondent had no right to resist him. No question is made, upon either side, but what the charge was correct in relation to the first breaking open the house. It is a familiar maxim of the law, that "a man's house is his castle," and that he has a right to defend it. How far he may carry his defence, and within what bounds it must be restrained, is the subject of inquiry. A man has a right to defend himself against an unlawful aggression, to an extent that shall make his defence *effective*, without regard to consequences. Chitty, in his treatise upon criminal law, lays down the doctrine, in its broadest sense, that the breaking the outer door of a dwelling house, upon civil process, is *unjustifiable*. The inquiry, therefore, is, whether, having thus done what is unjustifiable, the sheriff may, by the means and aid of this unjustifiable act, proceed to do a lawful act.

The officer, when he restrains the debtor of his liberty, justifies the act by the authority of the law, not by any natural right of his own to do so. It then presents this strange anomaly, that an officer, who has no authority, except what is delegated to him by the law for a specified purpose, can justify an attempt to restrain the liberty of another, when his purpose is aided and accomplished by an *unjustifiable* act, and a breach of the very law, under which he assumes to act. Mr. Chitty makes a distinction between the killing an *officer*, thus breaking the outer door, and one not an officer. But what shall be the effect of any resistance short of killing, he does not say. There are instances, in which an officer may be resisted, which he enumerates; and they are,—1, When the warrant is defective,—2, When it is not enforced by a proper officer,—3, When it is executed out of the jurisdiction,—4, When the wrong person is taken under it; so that, by this authority, it seems that the *person* of the officer is not so sacred, that all *other rights* must *yield* and be *postponed* to his. It would, by this, seem, therefore, that, in order to throw the shield of the law over an officer, so as to make it *criminal* for another to resist him in what he is attempting to do, certain requisites are *necessary*. He must not only be a legal and proper officer, but he must have a good and sufficient precept, which he is attempting to execute, and he must be attempting to execute it in a *legal* way. Was the officer attempting to execute his precept in a legal way, when his *first act* was *unjustifiable* and against law?

There is another way of testing this, that I do not recollect was noticed in argument. After the respondent had made the resistance, for which he is indicted, he was arrested by the officer. Now suppose the respondent had instituted proceedings to obtain a discharge from that arrest,—what would have been the inquiry, and what ought to have been the judgment? Without answering the question, which I have proposed, we can see what has been the *inquiry* and what the judgment in analogous cases. There are certain times and occasions, on which persons are exempted from *arrest* on civil process,—such as witnesses, parties and jurors, in attendance upon court, and members of parliament, public ambassadors and their servants; and when such are arrested, and even committed on execution, they are discharged from custody, and in some cases it has been held, that the court had the power to punish the officer

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for arresting them. *Bartlett v. Hebbes*, 5 T. R. 686; 2 Johns. 294; 7 Johns. 538; Yelv. 29, note, and cases there cited.

When a man is wrongfully brought into a jurisdiction, and is there lawfully arrested, yet he ought to be discharged; for "no lawful thing, founded on a wrongful act, can be supported;" *Per* Lord Holt, in 11 Mod. 51. Where a person was detained without a writ, and afterwards, while thus detained, was arrested on a writ, he was discharged; 2 H. Bl. 29. All these legal maxims have their *correlatives*. When A. unlawfully attempts to arrest B., B. may lawfully resist him. Whatever I may *lawfully* enjoy, I may lawfully defend. In the protection of my own rights, whatever it is *unlawful* for another to do, it is lawful for me to *prevent* him from doing.

In the present case, then, if it was unlawful for the officer to break open the house, in order to arrest the respondent, it was lawful for the respondent to prevent him from doing it. The breaking and arresting were dependent, one upon the other, and are not to be disconnected. The breaking was for the purpose of *arresting*, and the *arresting* was *consequent* upon the *breaking*. It would therefore seem to follow, that, if one was *unlawful*, the other was equally so.

The case of *Semayne v. Gresham*, from 5 Co. 91, reported in Yelverton 29, has been cited by the attorney for the government. All that can fairly be deduced from that case is, that the officer cannot break the outer door, and that the defendant, when he sees the sheriff coming, may shut his door against him; for that is all the defendant did, and it was for that, that he was sued. If it is to be held, that all, that is meant by a man's house being his castle, is, that he may defend it, if he can, but that, if he cannot, and is overcome, he is then left as defenceless as he would have been under other circumstances, then the notion about his house being a protection to him is all frittered away and is a mere shadow. The case of *State v. Miller* is also cited; but that is far from being authority for this case. The most that case settles is, that it will not do for a man to resist the sheriff, when about to take property, but that, if the sheriff takes property, that does not belong to the defendant, he must answer in a suit for damage, where the question can be tried. The case of *Ilsey v. Nichols*, 12 Pick. 280, goes farther than it is necessary to go, in deciding this case. In that case it is held, that,

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when the officer breaks the outer door, to attach property of the debtor, and attaches the property, he is a trespasser, not only for breaking the house, but for taking the goods also. That is a well considered case, and is founded on such considerations, as would govern one like the present.

We therefore consider that the charge of the county court was erroneous in this particular. The court had no occasion to give the jury any instruction in relation to the kind or degree of resistance, that the respondent might make, while they held that he could not lawfully make any; and of course none was given; and perhaps that question could not well arise, as the case finds that he did not use so much resistance, as to effect his purpose,—as the officer succeeded in arresting him.

A new trial is granted, and the case is remanded to the county court.

RUTLAND COUNTY,

JANUARY TERM, 1845.

[Continued from ante, page 284.]

JAMES McDANIELS v. TIMOTHY REED AND JOHN VAIL.

The defendant, in an action of ejectment, is liable, if he were in possession of the demanded premises at the time of the commencement of the plaintiff's action; and for this purpose the time of the service of the writ is to be treated as the commencement of the action.

And *actual* possession by the defendant is not necessary; it is sufficient if the defendant have a deed of the premises, which has been recorded in the town clerk's office of the town where the land lies, and *claims* to have purchased the premises.

So the plaintiff, in ejectment, must also have a right of action at the time of final judgment. If, therefore, the action be founded upon a mortgage, and the defendant, at any time before final judgment, tender to the plaintiff the amount due upon the debt secured by the mortgage and the costs in the action of ejectment, the plaintiff's right of action upon the mortgage is taken away, and he can no longer claim judgment in his favor in the ejectment.

And if the plaintiff, in such case, claim title to the demanded premises by virtue of several mortgage deeds, which describe distinct parcels of land, and were given to secure distinct debts, the tender may be made of the amount due upon the debts secured by part of the mortgage deeds, and the plaintiff's right of action, as to the premises described in those deeds, will thereby be taken away; and it makes no difference, in this respect, whether the deeds were originally executed to different individuals, and have come to the present plaintiff by assignment, or, *Per HUBBARD, J.*, whether they were all originally given to the plaintiff.

And it is not necessary that the defendant, in such case, having made a legal tender, should show that the tender has been kept good, and bring the money into court; it is sufficient, to entitle him to a recovery, for him to prove the making of the tender, and the refusal, on the part of the plaintiff, to receive it.

McDaniels v. Reed et al.

EJECTMENT. Plea, the general issue, and trial by jury.

The plaintiff claimed title to the demanded premises by virtue of several mortgage deeds, executed by the defendant Reed, and which described distinct premises, parcel of the demanded premises. One of said deeds was given to Alexander Barrett, to secure six promissory notes, amounting in all to the sum of \$2500, and bore date January 10, 1828, and was, by said Barrett, assigned to the plaintiff on the 7th day of March, 1828; another of said deeds was executed to the plaintiff, to secure a promissory note for the sum of \$600, and bore date April 26, 1830; and the other of said deeds was executed to Thomas McDaniels, to secure a promissory note for the sum of \$2000, and bore date February 16, 1835, and was, by the said Thomas McDaniels, assigned to the plaintiff on the 25th day of May, 1835.

To show the liability of the defendant Vail in this action, the plaintiff offered in evidence a copy of the record of a deed, duly certified by the town clerk, which deed bore date subsequent to the suing out of the writ in this action, but prior to the service of the same, and purported to convey to the said Vail the demanded premises. To the admission of this evidence the defendants objected, upon the ground that this deed was executed subsequent to the commencement of this action; but the court decided that the time of the service of the writ in the action was the commencement of the action, and admitted the evidence. The plaintiff also introduced evidence tending to prove that in May, or June, 1842,—which was subsequent to the service of the writ in this action,—the said Vail claimed to have purchased the premises. And the court, upon this point, charged the jury, that, the deed to Vail having been put upon record, and Vail claiming to have purchased the premises, they were at liberty to find that Vail accepted the deed, at the time it was executed, and that this would entitle the plaintiff to recover, as against Vail. It appeared that the defendant Reed was in possession of the premises, at the time of the commencement of this action.

The defendants offered evidence, to prove, that, during the pendency of this action, and since the last term of the county court, they had tendered to the plaintiff the sums due upon two of the debts, secured by the mortgage deeds of two of the parcels of land

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described in the plaintiff's declaration, together with the costs of this suit. To the admission of this evidence the plaintiff objected, and it was excluded by the court.

The jury returned a verdict for the plaintiff. Exceptions by defendants.

S. H. & E. F. Hodges and *R. Pierpoint* for defendants.

I. The defendants insist that Vail is not properly joined in this suit, because, at the date of the writ, he was not in actual or constructive possession of the premises. The date of the writ is the commencement of the action, and the day of service is unimportant, so it be within the limits, prescribed by the laws regulating judicial proceedings, after suing out the writ. 1 D. Ch. 94; 7 Vt. 426. The plaintiff must show that the defendant was in possession, at the commencement of the suit. 3 Vt. 448.

II. The tender, made by the defendants, is a bar to farther proceedings in this suit. Coate on Mort. 315. 2 Cow. 195. 10 Vt. 578. 7 Wend. 98. 4 Vt. 105. 3 Vt. 202. 11 Vt. 264. 5 Conn. 202. 2 Ib. 600. *Austin v. Burbank*, 2 Day 474. *Crosby v. Brownson*, 1b. 425. The proceeding by action of ejectment is only one form of enforcing the collection of the notes, and does not, in any manner, change the relation of the parties. The mortgagee is creditor of the mortgagor, and not purchaser of his land. 5 Wend. 603. From these cases we find the inference inevitable, that a tender is effectual in ejectment. 11 Vt. 264. 18 Johns. 110. 21 Wend. 468. 7 Wend. 98. *Williams v. Sorrell*, 4 Vex. 389.

III. Were the defendants bound to pay all the mortgages, before they could redeem one? The mortgages are upon different pieces of land, to different persons, and incident to different debts.

1. It is admitted, that, when there are two mortgages, each of a different piece of land, *between the same persons*, the mortgagor cannot redeem one, without redeeming both. *Purefoy v. Purefoy*, 1 Vern. 29. *Shuttleworth v. Laycock*, 1 Vern. 245. *Mergraves v. Lekook*, 2 Vern. 207. *Pope v. Onslow*, 2 Vern. 236. *Tribourg v. Pomfret et al.*, and *Titley v. Davis*, cited in *Ex parte Carter*, Amb. 733. The case is said to be the same with the assignee of the mortgage. *Cator v. Charlton* and *Collett v. Munden*, cited in

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2 Ves. 376. 2 Cox 425. But these cases, involving the right of the assignee, have been doubted in England, and, it is believed, have never been received in this country. *Ex parte King*, 1 Atk. 300. 2 Eden 78. Admitting the whole ground, assumed by the judges in deciding these cases, to be tenable, there is a wide distinction between the principles decided, and those involved in the claims of the plaintiff in the suit at bar. In all these cases the mortgages were made by one grantor, and to one grantee. Between the same parties equities might well extend to transactions different from those in which they originated; but where the interests of third persons are to be affected, they must be confined to the limits of the contract, by which they are called into existence. 2 Ves. 376.

2. But in these cases the court have decided upon the supposed intent of the parties, to supply, by a second mortgage, the deficiencies of a first.

3. All the cases, cited in support of this doctrine, are where the heir has sued, to redeem an estate mortgaged by the ancestor; and, "to avoid circuity of action," the tacking is allowed.

4. These are all cases, where the mortgagor, or those claiming under him, have resorted to equity to redeem forfeited estates. *Story's Eq. Jur.* 1030.

5. Here, the plaintiff comes into a court of law, to recover possession of the premises described in his different deeds. He has selected his remedy, and he must be governed by the law of the court, in which he sues. *Jones v. Smith*, 2 Ves. 376. *Brayt.* 166. 13 Vt. 310.

————— for plaintiff.

I. The plaintiff contends, that the *service* of the writ is the commencement of the suit, for the purpose of testing the right of the plaintiff to join Vail in the suit, as landlord. 7 Vt. 124. *Hall v. Peck*, 10 Vt. 474. 4 Conn. 149. *Bronson v. Earl*, 17 Johns. 63. *Burdick v. Green*, 18 Johns. 14. *Visscher v. Gansevoort*, 18 Johns. 496. *Ross v. Luther*, 4 Cow. 158. *Brown v. Babington*, 2 Ld. Raym. 868. *Harris v. Woolford*, 6 T. R. 617.

II. The county court were right in their charge to the jury in reference to the acceptance of the deed by Vail, and the right

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thereby given to the plaintiff to recover against him. *Warner v. Pate et al.*, 5 Vt. 166. *Ib.* 243. 9 Vt. 178. The acceptance of the deed, duly executed and recorded, is always presumed from the fact, that it is beneficial to the grantee. *Denton v. Perry et al.*, 5 Vt. 382. *Church v. Gilman*, 15 Wend. 656.

III. In regard to the offer to prove the tender of the amount due on two of the pieces mortgaged, the plaintiff contends,

1. That a tender should have been for the whole sum due upon all the mortgages. 2 Sw. Dig. 183-189. 2 Day 211. 3 Ib. 397. 2 Vern. 286. Ambl. 733.

2. That the tender was not in time,—not having been made three days before the sitting of the court, to which the writ was made returnable. Rev. St. 471, § 6.

3. That the defendants did not bring the money into court.

The opinion of the court was delivered by

HEBARD J. The plaintiff claimed title to the premises described in his declaration by virtue of several mortgage deeds. No question has been raised, but what the action was well conceived as to the defendant Reed. The right to recover against the defendant Vail depends upon several questions. The first is, as to the point of time, in reference to the proceedings, which is to be regarded as the commencement of the action. It seems, that, at the time the writ bears date, Vail was not in possession of any part of the premises, and had no title to any part of them. But before the service of the writ he had a deed of the premises, which was put on record, and he was claiming to have purchased the premises.

The plaintiff must have a right of action at the commencement of the suit, to entitle him to recover; and upon this fact the question presents itself. If we were at liberty to indulge in conjectures in relation to the facts, which are not presented by the bill of exceptions, we should conclude, that, at the time the writ issued from the *prothonotary*, the name of Vail was not in it; but, while the writ was in the plaintiff's hands, and before service, learning the fact, that Vail had become interested in the premises, his name was then inserted. If this is the true solution of the matter, and that fact had appeared from the exceptions, we should have no hesitation in saying, that the action was not misconceived as to him, whether we

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hold the *sueing out* the writ to be the commencement of the suit, or the *service* of the writ; for the insertion of the defendant Vail's name would be the time, when the writ, as to him, was in fact sued out.

For some purposes one time, and for others another, has been regarded as the commencement of the action. With reference to the statute of limitations, as in the case of *Lamb v. Day*, 8 Vt. 407, the *sueing out* the writ has been regarded as the commencement of the suit; and for this purpose there is an apparent reason for fixing upon this as the time. It is by the plaintiff's sleeping upon his rights for a determinate period, that his claim becomes barred. When he is moving, and doing what the law enables him to do, he is regarded as vigilant; and from such time no such presumption, as grows out of the statute of *limitations*, can reasonably attach. And this has no reference to maturing, or originating, a cause of action; but its effect is, to prevent one from being lost, that has for a long time been mature.

In other cases, when the fact is to determine whether the cause of action has become mature,—as in the action of trover, when a demand is necessary, as evidence of a conversion,—or in the action of assumpsit, when, from the nature of the contract, a demand is essential to the right of recovery,—then the service of the writ is considered the commencement of the suit; as in the case of *Hall et al. v. Peck et al.*, 10 Vt. 474.

The practice of obtaining and issuing writs is such, that it would make it inconvenient to adopt a different rule. The attorney, or his clerk, fills up a writ, and gives it such a date, as suits his convenience. The defendant has no interest in the writ, until it is served, and is, before that time, in no way affected by it.

We therefore hold, that, in this case, the service of the writ was the commencement of the suit.

The next question arises upon the sufficiency of the defendant's tender. By the bill of exceptions it appears that the defendants offered to prove, that, since the last term of the court, they had tendered to the plaintiff the sum due on two of the parcels of land described in the plaintiff's writ and the plaintiff's costs in this action. This testimony was excluded by the court; and the decision of the court is attempted to be sustained on two grounds. The first is,

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that the plaintiff held another mortgage, of another piece of land, and that he was not bound to accept a part, without the whole.

The three mortgage deeds are of different dates, were given to different individuals, contain distinct parcels of land, and were given for the security of different debts. They would therefore seem to have no connection with each other, in any respect. They are as disconnected now, as they were, when first given. Each piece of land stands pledged, as before, for its own debt. And there is no doubt, that Reed is at liberty to redeem any one of these pieces, without the rest, if he chooses. That they are now in the same person makes no difference, as affecting the mortgagor. He was no party to that arrangement, by which the plaintiff has taken the assignment of those mortgages; and if they had all been given to the same *individual*, I do not conceive that any fair presumption could arise, that he intended to tack the subsequent mortgages, on to the first.

The next objection to the tender, and the evidence offered to prove it, is, that it was not made in season. This objection is founded on a misconceived notion of the legal effect of the tender, when offered. This action is ejectment. The tender is not made upon this action, and never could be made upon it. This action of ejectment is founded upon a mortgage; and the mortgage is only an incident to the debt; and the right to recover depends upon the fact, whether, at the time, there is a right of action upon the debt. The tender, therefore, was upon the debt; and if a legal tender was made upon the debt, the right of action was thereby suspended. If the right of action was suspended upon the debt, *eo instanti* it was suspended upon the mortgage. In an action of ejectment the plaintiff must have a right to recover, at the time he commences his action, and also at the time the judgment is rendered. If, after the commencement of the suit, the cause of action is by any means taken away, the plaintiff cannot recover, unless, by some means, he is again subrogated to it before judgment.

This tender was upon the debt, and might be made at any time, and one time, as well as another; and I see no objection to its having been made upon the trial; and the effect would have been the same. If it was made at any time, when the fact could be incorporated into the case, according to the usual mode of proceeding

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on trial, it should have been received, and the tender would have its effect upon the debt as effectually, as if no action was pending upon the mortgage. This action upon the mortgage was all the time liable to be defeated by payment, not only before judgment, but after.

The case of *Edwards v. Fire Insurance Co.*, 21 Wend. 468, which has been cited, goes farther than we are required to go in this case. It was there held that the *tender* was a discharge of the mortgage security. Whether that is so, or not, we hold that it was a suspension of the plaintiff's right of action, at least, and that it could only be revived by a refusal, on the part of the defendants, to pay the money, when the plaintiff should signify a willingness to receive it. If the tender had been made on the day the money became due, we are inclined to think it would have the effect, given to it in that case, leaving the plaintiff to seek his remedy by a suit upon the indebtedness.

This disposes of a farther objection,—that there was no offer to show that the *tender* had been kept good and the money brought in to court. The money need not be in court; it had nothing to do with the suit on trial. That action was for the recovery of land, not money. It was sufficient, if the defendants made a good tender and had the money ready to deliver to the plaintiff, when he should call for it.

The judgment is reversed.



INDEX.

ABATEMENT, *See* PLEADING; CRIMINAL LAW.

ACCESSORY, *See* CRIMINAL LAW 3-6.

ACCOUNT.

1. The individual members of a copartnership, who have advanced money for the benefit of the firm, are, in an action of account brought to liquidate the concerns of the firm, entitled to interest on such advances from the time they were made. *Hodges et al. v. Parker et al.*, 242.
2. A declaration in account, which alleges that the defendant was bailiff of the plaintiff of certain property, and which shows that the parties were joint tenants of the property, is sustained by evidence tending to show a joint ownership of the property, and that the defendant has received more than his share of the avails of the property; and this evidence, upon the issue whether the defendant was bailiff and receiver, will entitle the plaintiff to a verdict. *Onion v. Fullerton*, 359.
3. In the action of account the proof under the plea of *plene computavit* is somewhat different from what it is before the auditor, on the issue of *nothing in arrears*. The former defence seems to rest upon the ground of an express settlement of the dispute, and a surrender of all the property pertaining to the trust, while the latter issue is sustained by merely showing that there is nothing *now* in the defendant's hands, for which he is liable to account; which may be shown, either by proving that the property has been surrendered to the plaintiff, or to a third person, by the plaintiff's direction, or that it has been destroyed, or has perished, without the fault of the defendant. *Pickett v. Pearsons*, 470.
4. The rules of pleading, in the action of account, laid down in *Bishop v. Baldwin*, 14 Vt. 145, recognized and affirmed. *Ib.*
5. An agent can only be held liable for neglect, in an action of account, in a case where the negligence has been gross and palpable. *Ib.*

See AGENT 4, 5.

ACTION.

1. If the husband appoint an attorney to receive the money upon his wife's

- chase in action*, and the attorney actually receive the money, the wife cannot join with the husband in a suit to recover the money from the attorney, but the husband must sue alone. *Hill et ux. v. Royce*, 190.
2. The legal interest in a contract is in the person to whom the promise is made, and from whom the consideration passes, and he is the person who must bring the action upon such contract,—as held in *Pangborn v. Saxton*, 11 Vt. 79, and *Crampton v. Ballard*, 10 Vt. 251. *Hall v. Hinton*, 244.
 3. The case of *Dutton et ux. v. Pool*, 2 Lev. 210, 1 Vent. 318, T. Raym. 302, commented upon and explained. *Id.*
 4. The omission to join, in an action, one of two or more joint contractors is no ground of defence on trial; and it would not be good ground for abating the suit even, if the person omitted were a silent partner with the other defendants, or if the fact of his liability were kept concealed from the plaintiffs by the other defendants. *Hicks et. al. v. Cram et al.*, 449.
 5. Where the defendant contracted to deliver to the plaintiffs thirty tons of starch per year for two years, it was held that the contract, though entire in its terms, was yet divisible in its character, and that the plaintiffs might, at the expiration of the first year, sustain an action against the defendant for any breach, on his part, of that portion of the contract that was to be performed that year. *Mixer et al. v. Williams*, 457.
 6. If an attorney, having a demand entrusted to him for collection, fraudulently deceive his client in reference to the responsibility of the debtor, and the value of the demand, and thereby prevail upon the client to sell to him the demand for less than the amount due upon it, and the attorney subsequently collect the whole amount of the demand, he will not be liable to refund to the debtor the amount received by him above the amount paid by him to the client; but he will be liable to the client therefor. *Marshall v. Joy*, 546.
 7. If a receipt for property attached is signed by several, and they, in terms, "jointly and severally" promise to keep and deliver up the property, or pay all damage, the officer taking the receipt may maintain an action thereon against any one of such signers; and it is unnecessary to notice, in the declaration, the fact that there were other signers of the receipt. *Mayfield v. Scott*, 634.
 8. The defendant, in an action of ejectment, is liable, if he were in possession of the demanded premises at the time of the commencement of the plaintiff's action; and for this purpose the time of the service of the writ is to be treated as the commencement of the action. *McDaniels v. Reed et al.*, 674.

See ASSIGNMENT 10-12; EX'RS & ADM'RS 1; PRACTICE 12.

ACTION ON THE CASE.

1. In regard to injuries to the person, or to personal property, where the injury is directly inflicted by a forcible act, as where a blow is given to a person, or an act of violence is committed upon his beast, or other property, causing injury, the party aggrieved has generally no choice of actions, and trespass is his only remedy; but if he have sustained a forcible injury, of-

feeted by means flowing from the act of the defendant, but not operating by the very force and impulse of that act, he may sustain either trespass or case. *Waterman v. Hall et al.*, 128.

2. If the ultimate injury consists neither in the act of the defendant, nor in the continued physical impulse of that act, the plaintiff *may*, as he more frequently *must*, proceed in case. *Ib.*
3. In this case the injury alleged consisted in driving the plaintiff's beast upon a fence, whereby its death was caused, and it was held that either trespass, or case, would lie. *Ib.*
4. If, under a declaration in trespass on the case, alleging that the defendant falsely warranted a horse to be sound, knowing him, at the time of making the warranty, to be unsound, the plaintiff prove a representation by the defendant of soundness, which, at the time of making it, the defendant knew to be false, it is sufficient to entitle the plaintiff to a verdict. *West v. Emery*, 583.
5. And if, in such case, the declaration allege an *absolute* representation of soundness, and a *scienter* by the defendant of its falsity, and the proof shows that the representation by the defendant was, that the property was sound, "so far as he knew," and the plaintiff also prove that the defendant in fact knew, at the time of making the representation, that the property was unsound, this will be no variance,—since a representation of absolute soundness and a representation qualified as above, which the defendant, at the time of making it, knows to be false, bind the defendant to the same extent. *Ib.*
6. But if the declaration allege an absolute warranty merely, and, as a breach, that the fact warranted did not exist, without alleging the *scienter*, this will not be supported by proof of a qualified warranty. *Ib.*

See EX'RS & ADM'RS 6.

ACTIONS PENAL.

1. The statute, which requires a certificate to be made upon a writ of the "day, month and year when the same was signed," is one affecting the remedy,—and the statute in force at the time the action is commenced must govern. *Pollard, q. t., v. Wilder*, 48.
2. A certificate of the day, month and year when the writ was *exhibited* to the magistrate signing it, is not a compliance with that section of the Revised Statutes which requires a minute to be made upon such writ of the time when the same was *signed*;—and a certificate, defective in this respect, cannot afterwards, and after the action is entered in court, be amended, so as to comply with the statute. *Ib.*
3. But the motion to dismiss an action for want of the proper certificate upon the writ must be regarded in the nature of a plea in abatement, and, if not made at the time, and agreeably to the rules of court governing dilatory pleas, will be considered as waived. *Ib.*
4. A declaration, in an action brought to recover the penalty given by statute

for taking excessive and illegal fees, which specifies all the items of fees charged, and avers that the *excess* of fees therein charged was "a large sum, to wit, the sum of \$4.00," might be bad upon demurrer, for not specifying the items of *illegal fees* taken, but is sufficient after verdict. *Henry v. Wilson*, 479.

5. An officer, who receives illegal fees, is liable to the penalty imposed by sect. 16 of chap. 106 of the Revised Statutes, whether such fees are received for services for which a fixed compensation is given by law, or for services not specified in the fee bill, and for which compensation is allowed under sect. 8 of chap. 107 of the Revised Statutes. *Ib.*
6. But an officer, who receives illegal fees, is not liable to the penalty imposed by sec. 16 of chap. 106 of the Revised Statutes, unless he received such illegal fees *knowingly*. In this respect the sixteenth section must have the same construction with the fourteenth and fifteenth sections. *Ib.*
7. If a constable receive fees for travel from the place of commitment to the office of the treasurer, to whom he is required to pay the tax, when collected, he is entitled to prove, in an action brought against him to recover the penalty given by statute for receiving illegal fees, that it had been the usual practice of collectors of taxes to charge such fees. *Ib.*
8. Several creditors, having distinct and separate debts due to them severally from the same debtor, cannot join as plaintiffs in an action *qui tam* against such debtor, to recover the penalty given by statute for being party to a fraudulent conveyance, or judgment. *Carroll et al., q. t., v. Aldrich*, 569.
9. The statute of 1821,—Sl. St. 266,—which imposed a penalty for being party to a fraudulent note, or judgment, continued in force until July, 1840, and all penalties incurred therefor prior to that time accrued subject to the provisions of that statute. *Webb, q. t., v. Long*, 587.
10. Under that statute the whole amount of a judgment was forfeited, though but part of the consideration was fraudulent. *Ib.*

AD DAMNUM, *See* JURISDICTION 7.

ADMINISTRATORS, *See* EXECUTORS & ADMINISTRATORS.

ADMINISTRATION BOND, *See* EX'RS & ADM'RS 7.

ADVERSE POSSESSION.

1. A deed of land from one out of possession, which is void, under the statute of 1807, by reason of the adverse possession of a third person, will not affect the right of the grantor in such deed to maintain an action of ejectment against such third person. *Nason v. Blaisdell*, 216.

See EJECTMENT.

AFFIDAVIT, *See* EXECUTION 3, 4.

AGENT.

1. An agent, who makes a promise, and who does not conceal his agency, nor exceed his authority, is not liable to an action upon such promise. *Hall v. Huntton*, 244.
2. An agent can only be held liable for neglect, in an action of account, in a case where the negligence has been gross and palpable. *Pickett v. Pearsons*, 470.
3. An agent is only bound by the instructions of his principal as he understood them, unless there was fraud, or some fault on his part, in not comprehending them; and he will not, in the absence of all proof, be presumed to be in fault in not comprehending oral instructions to their full extent. *Ib.*
4. If an agent take a demand for collection, and receive, in payment, bills of a bank, the solvency of which he does not know, and take the guaranty of the debtor, with surety, that the bills are good, and, upon making his conduct known to his principal, the principal receive the money and guaranty, saying he will see what can be done with the money, and he then keep it two or three months to ascertain its value, and the bills prove to have been worth but twenty cents on the dollar at the time they were received by the agent, the agent is not liable, in an action of account, for the deficiency in the value of the bills, but the principal will be considered as having acquiesced, by his conduct, in the doings of the agent. *Ib.*
5. So where the agent, in such case, took from the debtor a note for part of the demand, instead of requiring money, as directed, and the principal received the note, and controlled it, and retained possession of it until the hearing before the auditor in an action of account against the agent, it was held that the agent could not be charged with the note in such action, as for so much money received. *Ib.*
6. An agent, employed for the purpose of superintending the sale of stoves and hollow ware for his principal in a given section of country, and who is authorized to receive payment therefor in different articles of the produce of the country, is not authorized to execute a note, payable in such wares at a future day, and thus bind his principal by his acknowledgment of "value received." *Denison v. Tyson*, 549.
7. In order to recover upon such a contract, executed by the agent, without any express authority from his principal, the contract must be declared upon specially, and the plaintiff must prove that the consideration of the note came fairly within the scope of the agent's authority, or that it came to the use of the principal. *Ib.*

AGREEMENT, *See* CONTRACT.

AMENDMENT.

1. A certificate of the day, month and year when the writ was exhibited to the magistrate signing it, is not a compliance with that section of the Revised Statutes which requires a minute to be made upon such writ of the time when the same was signed;—and a certificate, defective in this respect, can-

not afterwards, and after the action is entered in court, be amended, so as to comply with the statute. *Pollard q. t. v. Wilder*, 48.

2. When, after an amendment has been permitted in the county court, the action has progressed to trial and judgment, it must appear beyond a doubt that the amendment was permitted contrary to law, to justify the supreme court in setting aside the subsequent proceedings for that cause. *Waterman v. Hall et al.*, 128.

See PRACTICE 14.

ANSWER IN CHANCERY, See CHANCERY.

APPEAL.

1. Where an appeal had been taken by the defendant from a justice's judgment, and the defendant neglected to enter the appeal in the county court, and the plaintiff entered the action for an affirmance of the judgment, it was held no cause for dismissing the action, that the defendant, more than twelve days before the term, to which the appeal was taken, tendered a confession of judgment, under the statute, before the justice who rendered the original judgment, and that the justice, being then out of office, refused to accept the same. *Smith v. Fisher*, 117.

See POOR; RECOGNIZANCE 6.

APPEARANCE.

1. A general appearance, entered, by the defendants in a suit, upon the docket of the court, and submitting to the jurisdiction of the court, by pleading to the merits of the suit, is a waiver of any defect of service, which might have been taken advantage of by pleading. *Bennett et al. v. Stickney*, 531.
2. When a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit on the part of the defendants; and an appearance in the suit, entered by the attorney thus employed, will be binding and conclusive upon the other partners. *Ib.*

See JUDGMENT 4.

ARBITRATION.

1. Arbitrators, to whom is submitted a question in reference to the relative value of property, must, in their appraisal, keep strictly within the terms and requirements of the submission; and if they vary from, or exceed, the powers conferred upon them, their award will be void. *Howard v. Edgell et al.*, 9.
2. Where the parties agreed to change farms, and submitted to appraisers to determine the amount which should be paid as the difference between them, and it was provided in the submission that the value of the orator's farm should be called \$5000, and that, if, in the opinion of the appraisers, the orator's farm was overvalued, or undervalued, the defendant's farm should be valued in the same proportion, and the appraisers, in making their award, ascertained the *real value* of the farms, and hence deduced the difference to

be paid, without regard to the value fixed for the orator's farm in the submission, it was held that the award was void, as not having followed the submission, and would be set aside by a court of equity. *Ib.*

3. If it do not appear from the rule of reference of a case, that the referee was required to decide the case upon strictly legal ground, nor from his report, that he intended so to decide it, his report will not be set aside, though he may have mistaken the law in his decision. *Steen et al. v. Wardsworth*, 297.

ARREST OF JUDGMENT, *See* BANKRUPTCY 6; CRIMINAL LAW 18.

ASSIGNMENT.

1. The same change of possession, which is required in case of the sale of personal property, is required where personal property is assigned for the benefit of the assignee, as creditor of the assignor, and, after payment of his claims, for the benefit of the creditors generally of the assignor. *Hall v. Parsons*, 271.
2. But where the property assigned, in such case, consisted of a store of goods; and the assignee was the owner of the store, and of the land on which it stood, and, immediately upon the execution of the assignment, took down the sign of the assignor, and hired anew the clerk who had been before employed by the assignor, and took the control of the store, and opened a new set of books, and was present personally in the store most of the time after the assignment, attending to the business of the store, and until the time the goods were attached as the property of the assignor, it was held that a joint possession by the assignee and assignor, sufficient to render the sale fraudulent in law as against the creditors of the assignor, was not established by proof that the assignor, after the assignment, continued in the store, and assisted in making an inventory of the goods, and that he, and the clerk previously employed by him, continued, while making the inventory, to sell goods to the customers, and that, when the inventory was completed, the assignor took the books to his own house and posted them, and made settlements with those who had accounts thereon, and, when balances were found against him, gave memoranda of the amount, to be carried to the store, where the amount was paid in goods, and that, after about a week, the books were returned to the store, and, from that time, the assignor was in the store, settling with his customers, taking notes and pay for balances due, and, when the balances were against him, paying therefor in goods out of the store, and also, by the consent of the assignee, paying in goods from the store his outstanding due bills which were made payable in goods, and that he sold goods, and waited upon customers, and took goods for the use of his family, which were charged to him upon the books of the assignee, and had, in many instances, the sole charge and care of the store, selling goods and taking pay, in the absence of the assignee and of the clerk. *Ib.*
3. A general assignment, by a debtor, of all his property, for the benefit of all his creditors, executed prior to the enactment of the statute of 1843,—Acts of 1843 p. 7,—is valid, and must be sustained, under the decisions made in this state. *Hall et al. v. Denison & Tr.*, 310.

4. The assent of the creditors to such an assignment will be presumed, although they do not in any way become parties to it, or give any express assent. *Ib.*
5. And such an assignment is not rendered invalid, nor the presumption of assent of the creditors affected, by its containing a clause giving a preference to such creditors as shall, within ninety days, release their claims against the debtor by becoming parties to the assignment,—which contains a clause of release,—if the assignment also contain a general clause, providing for the division of all the property, remaining after paying the claims of the preferred creditors, *pro rata* among all the creditors. *Ib.*
6. Nor is the validity of such assignment affected, by its containing a clause providing for the delivery of the surplus of the property to the assignor, which shall remain after the assignee shall have fully performed the trust created by the assignment. *Ib.*
7. And such an instrument imports a consideration,—especially where a nominal consideration is expressed, and the assignee executes a covenant for the faithful performance of the trust. *Ib.*
8. Upon the execution of such an instrument, the relation of trustee and *cestui que trust* is at once created between the assignee and the creditors, so that the assignor cannot revoke the instrument; and the creditors cannot hold the assignee as trustee under the statute providing for the trustee process, when it does not appear that there will be a surplus remaining in the hands of the assignee, after paying all the debts. *Ib.*
9. By the statute of 1843,—Acts of 1843, p. 7,—all general assignments, thereafter made for the benefit of creditors, are declared to be, as against such creditors, *null and void*; and this statute prohibits, at least, an assignment of *all the property* of an insolvent debtor, for the benefit of *all his creditors*, even though they are to enjoy it *pro rata*; while it allows of a *preference* to be given to favorite creditors, to the exclusion of others,—and especially, if the solvent excepts from the assignment a remnant of his property. BENNETT, J. *Ib.*
10. Where a debtor makes an assignment of all his property for the benefit of all his creditors, any one of the creditors, who does not become a party to the deed of assignment, may sustain an action at any time, upon his claim, against the debtor, even though such creditor may have received from the assignee, out of the trust fund, a payment towards his claim. *Bank of Bel- lows Falls v. Deming et al.*, 366.
11. And if there be appended to the assignment an acceptance, to be signed by the creditors, by which those signing agree to await the accounting of the assignee, which acceptance is signed by a large proportion of the creditors, yet no assent to such clause, on the part of a creditor who does not sign such acceptance, will be implied from the fact that such creditor received from the assignee, out of the trust fund, a payment upon his claim, before he commenced any action upon his claim; nor will the acceptance of such payment by him, under these circumstances, preclude him from the right to commence such action at any time. *Ib.*

12. But, as against a creditor who signs such acceptance, such clause will operate as a temporary bar of his right of action upon his claim. *Kingsbury v. Deming et al.*, Windsor Co. 1843, cited by WILLIAMS, J. *Ib.*
13. When a debtor makes a voluntary assignment of all his property to a trustee for the benefit of certain of his creditors, who are specified, and does not provide that the surplus shall be distributed among all his creditors, but there is either an express reservation of the surplus to himself, or no direction given as to the surplus, the effect of which would be, by implication of law, a resulting trust, as to the surplus, to himself, such assignment is fraudulent *per se* and void. *Dana, Adm'r, v. Lull*, 390.
14. And this is so, notwithstanding it appears in the end that the property assigned was not sufficient to pay the debts due to the creditors named in the assignment. *Ib.*
15. And where the assignment, in terms, conveyed all the property, which the assignors owned in certain towns named, and it did not appear, either upon the face of the assignment, or from the evidence, that they owned any property which was situated elsewhere, it was held that the court would infer that *all* the property, which the assignors owned, was thereby conveyed. *Ib.*
16. One of two partners has not authority to assign all the partnership property to a trustee, for the benefit of the creditors of the firm, and thus put an end to the entire business of the firm. *REDFIELD, J., and BENNETT, J. Ib.*

See EVIDENCE 13.

ASSOCIATIONS.

1. A member of a voluntary association, formed for building a meeting house, who is appointed one of the building committee, and acts as such in making contracts and procuring materials for the building, is not individually liable to pay for services for which he thus contracts with one who knows his agency, and who knows that the contract is for the benefit of the association, and that it is entered into by the defendant merely as such agent. *Abbott v. Cobb*, 593.
2. If an action be brought against such agent, by one with whom he thus contracts for the benefit of the association, to recover for services rendered in pursuance of such contract, the individual members of the association are competent witnesses for the defendant,—their interest being equally balanced. *Ib.*

ASSUMPSIT.

1. It is too well settled to admit of a doubt, that an action for money had and received will lie to recover back money which has been paid upon a judgment subsequently reversed; and such action may be sustained, either against the party who prosecuted the suit, and for whose benefit the money was paid, or against his attorneys, while they retain the money in their hands. *BENNETT, J. Catlin v. Allen*, 158.
2. But the party, in whose name the original suit was prosecuted, and against

- whom the final judgment, reversing the former judgment, was rendered, is not estopped, by such judgment, from proving, in an action brought against him by the defendant in that suit to recover back money paid by him on the former judgment, that he was merely *nominal* plaintiff in that suit, without any interest therein, and that that fact was known to the defendant therein, and that no portion of the money so paid was ever received by him or paid to his use. *Ib.*
3. Therefore, where an action on a jail bond was prosecuted in the name of the sheriff, to whom it was taken, and judgment was rendered for the plaintiff therein, and the county court refused to stay execution, and the defendant in that action paid the amount of the judgment, and subsequently the judgment was reversed, and final judgment was rendered in favor of the defendant, it was held, in an action brought by that defendant against the sheriff, to recover back the money so paid, that the sheriff might prove that he had no interest in that suit, and never received any portion of the money so paid, but that the action was prosecuted by one who claimed to own said bond by purchase, and that this fact was known to the defendant in that suit, and that the plaintiff in interest received the money so paid by the defendant; and these facts were held a valid defence for the sheriff in this action. *Ib.*
 4. And it was held that the attorneys of record for the plaintiff in the former suit were competent witnesses for the sheriff, in this suit, to prove those facts. *Ib.*

ATTACHMENT.

1. If a writ, returnable before a justice of the peace, is put into the hands of an officer for service more than sixty days before the return day therein named, and the officer attach property upon the writ more than sixty days before the return day, he is not justified by the writ, and acquires no title to the property, as against an officer who subsequently takes the same property from his possession by virtue of a regular execution;—and it makes no difference that the debtor neglects to appear at the time set for trial in the first writ and object to the irregularity of the service. *Nelson v. Denison*, 73.
2. Hay, or grain in the straw, may be attached by the officer's leaving a copy of the writ of attachment in the town clerk's office of the town where the property is situated; and the *leaving such copy* gives to the officer the constructive possession of the property, and title and possession sufficient to enable him to maintain an action therefor against any one who subsequently removes, or converts, the same. *Putnam v. Clark*, 82.
3. It is not necessary, in such case, that the officer see the property, or go near it; and it is sufficient, if the copy of the attachment be left by him with the debtor at any time before the legal time of service upon the writ expires. *Ib.*
4. The officer, in such case, may maintain trespass against another officer, who, subsequent to the leaving the copy in the town clerk's office, and before the copy is delivered to the debtor, attaches and removes the same property by virtue of a legal writ of attachment against the same debtor. *Ib.*
5. An officer, when serving a writ and attaching property, acts as the agent of

- the plaintiff; and when the parties to the writ have dissolved the attachment by settling the suit, the officer has no farther lien upon the property attached, and has no right to retain it in his hands as security for his services. *Felker v. Emerson*, 101.
6. Where a creditor puts a writ of attachment against his debtor into the hands of a sheriff, and directs the sheriff to attach certain property as the property of the debtor, and tenders to him a suitable bond of indemnity for so doing, and the sheriff refuses to attach the property, the creditor cannot sustain an action against the sheriff for such refusal, if the property which the sheriff was directed to attach was in fact the property of a person other than the debtor. *Hutchinson et al. v. Lull*, 133.
 7. If the heir of an intestate be a *feme covert*, her husband has an interest in the real estate, as tenant by the curtesy, which may be conveyed, or which may be taken for his debts. *Hyde v. Barney*, 280.
 8. And the interest of the husband in such estate may be attached immediately upon the decease of the ancestor, before any distribution, or any action of the probate court, and may be levied on by execution. *Ib.*
 9. One who has executed a receipt to an attaching officer, for property attached, thereby promising to deliver the property to the officer upon demand, may show, in defence of an action against him upon the receipt, that the property receipted was, at the time of the attachment, his property, and not liable to the attachment, and that he then so informed the officer; and such showing will entitle him to judgment in his favor. *Adams v. Fox*, 361.
 10. If one, specially deputed to serve a writ of attachment, be about to make service of the process by attaching thereon, as the property of the defendant, property which belongs to a third person, and in which the defendant has no attachable interest, it will not be lawful for the real owner of the property to resist the making of such attachment. *State v. Buchanan et al.*, 573.
 11. And if resistance be made to such attachment, the persons resisting will not be allowed, on trial of an indictment against them therefor, to prove, in defence, that the process, upon which the attachment was about being made, was sued out by connivance of the plaintiff and defendant therein and of the officer, and was intended to be used by them for the purpose of placing the property attached, which belonged to one of the respondents, in the hands of insolvent and irresponsible persons, so as to deprive the owner of his property, or fraudulently compel him to pay money in order to regain the possession of it. *Ib.*
 12. A person, who is specially authorized to serve a writ, and who serves the same by attaching property, and delivers the property to a receiptor, may maintain an action upon the receipt, against such receiptor, in his own name, if the receiptor, after due demand by a legal officer, refuse to deliver the property to be disposed of upon the execution. *Maxfield v. Scott*, 634.
- See ACTION 7; EVIDENCE 9; JURISDICTION 9; PROMISSORY NOTES 12.

ATTORNEY, See ACTION 6; TRUSTEE PROCESS 3.

AUDITA QUERELA.

1. A writ of *audita querela* is within the statute,—Rev. St. c. 28, § 5,—which requires a recognizance to be taken to the defendant for his costs, &c.; and a sufficient minute of such recognizance must appear upon the writ. *Sisco v. Hurlburt*, 118.
2. If a judgment creditor take out execution against the *body* of the defendant, when the judgment was recovered in an action founded upon a contract entered into subsequent to the first day of January, 1839, and the body of the debtor be arrested thereon, such execution will be set aside upon *audita querela*. *Stanley v. Mc Clure*, 253.
3. The remedy by *audita querela* is, in such case, concurrent with the remedy by motion. *Ib.*
4. *Audita querela* will not lie, to affect a judgment rendered by a justice of the peace, when the matter of the complaint would be proper subject for a writ of error; and it makes no difference that the right to bring a writ of error, in such case, has been taken away by statute. *Spear v. Flint*, 497.
5. Therefore, where the defendant, in an action before a justice of the peace, has due notice of the pendency of the suit, and appears, and is denied, by the justice, the right of a trial by jury, he can have no remedy, by writ of *audita querela*, against the plaintiff. *Ib.*
6. The case of *Tyler v. Lathrop*, 5 Vt. 170, extending the remedy by *audita querela* to a case, in which the right of appeal, to which the party was clearly entitled, was denied, has been held an authority in cases *precisely identical*, but not in cases similar only by a supposed analogy of reasoning. *Ib.*

See BANKRUPTCY 9-11.

AUDITOR, See BOOK ACCOUNT.

AUTHORIZED OFFICER, See ATTACHMENT 10-12.

AWARD, See ARBITRATION.

BAIL, See RECOGNIZANCE 10.

BAILIFF & RECEIVER, See ACCOUNT.

BAILMENT.

1. If property be bailed for a specified time, and, before the term expires, the bailee destroy the property, the bailor may sustain trover against him for its value. *Morse v. Crawford*, 499.

BANK, See CRIMINAL LAW.

BANKRUPTCY.

1. Where a surety executed, with his principal, a note payable in one year after its date, and, after the note became due, the principal obtained his discharge in bankruptcy, under the Act of Congress of Aug. 19, 1841, and the surety did not prove his contingent claim against the principal under the

- commission, under sect. 5 of the bankrupt Act, and, after the principal had obtained his discharge, the surety paid the note, it was held that the discharge in bankruptcy was no bar to an action in favor of the surety against the principal, to recover the money so paid. *Wells v. Mace et al. & Tr.*, 503.
2. In such action, the declaration being for money paid by the plaintiff for the defendant *at his request*, the moral obligation of the defendant to indemnify his surety is sufficient foundation for *implying*, in law, the *request* alleged. *Ib.*
3. The moral obligation resting upon a bankrupt to pay his debts, which were contracted prior to his discharge in bankruptcy, is a sufficient consideration for a new promise, after the discharge, to pay such debt. *Farmers & Mechanics v. Flint*, 508.
4. Such new promise may be proved by parol evidence. *Ib.*
5. And it seems that it is unnecessary to declare upon the new promise. But if this be necessary, yet if the plaintiff has declared upon the original contract, and has replied a new promise to the defendant's plea of bankruptcy, and the defendant has traversed the fact of such new promise, judgment will not be arrested,—since the replication is not a departure in pleading, nor is the issue, thus formed, immaterial. *Ib.*
6. When, in such case, it is apparent, from the whole record, that the judgment of the court below was correct, and that the same result must have followed, if the plaintiff had declared upon the new promise, judgment will not be arrested. *Ib.*
7. The courts of this state have jurisdiction of questions as to the effect of a discharge in bankruptcy, obtained from the district court of the United States under the Act of Congress of Aug. 19, 1841, upon judgments and contracts which might have been proved under the commission. *Comstock v. Groat*, 512.
8. A judgment in an action of tort, recovered against one who afterwards files his petition in the district court to be declared a bankrupt, is proveable under the commission, and is barred by the final discharge of the defendant as a bankrupt. *Ib.*
9. Where judgment was obtained against a defendant in an action of tort, and the court rendering the judgment also adjudged that the cause of action arose from the wilful and malicious act of the defendant and that he ought to be confined in close jail, and he was committed to jail upon the execution which issued on such judgment, and had filed in the district court of the United States, after the rendition of the judgment and prior to his commitment, his petition to be discharged as a bankrupt, and, while he was in confinement, obtained from the district court a final discharge and certificate as a bankrupt, and the plaintiff refused afterwards to discharge him from confinement, it was held, on *audita querela* brought by him against the plaintiff, setting forth these facts, that the action was well brought, and that the effect of the discharge in bankruptcy was to bar any farther prosecution of the judgment against him,—and it was accordingly ordered that he be discharged from imprisonment. *Ib.*

10. And it was held, that it was not necessary that the complainant should allege, in his complaint, that the jailor had refused to permit him to depart from the jail. *Ib.*
11. And it does not affect the complainant's right to bring *audita querela*, that he might, by possibility, have had a remedy by *habeas corpus*.

BASTARDY.

1. That a complaint for bastardy concludes with praying that the defendant may be made to answer, &c., agreeable to a certain statute law of this state, describing it, which statute was in fact repealed before the complaint was made, is no ground for objection,—the complaint being sufficient without any reference to the statute. The court will take notice of the general statutes of the state. *Blood v. Morrill et al.*, 598.
2. An order of affiliation, in a prosecution for bastardy, may be made by the county court upon the *default* of the defendant to appear and answer. *Ib.*

See RECOGNIZANCE 8-11.

BETTERMENTS.

1. When the jury, in an action of ejectment, have established the fact that the deed, under which the defendant claimed title, was fraudulent and void, and that the defendant was a party to the fraud, the defendant is not entitled, on a declaration for betterments, filed under the statute, to recover payment for the improvements which he has made upon the premises. *Thompson v. Gilman*, 109.
2. In such case the defendant in the suit for betterments is entitled to prove, in that suit, by the record in the action of ejectment, that such was the finding of the jury. *Ib.*
3. And the plaintiff in the suit for betterments is not entitled, in that suit, to give in evidence any facts, which tend to show that such deed was not fraudulent,—that matter having become *res adjudicata* by the verdict in the former action. *Ib.*
4. Neither is he entitled to give in evidence any facts, which tend to show that the plaintiff in the action of ejectment had no title to the premises in question. *Ib.*

BILL IN CHANCERY, See CHANCERY.

BOND, See CHANCERY 13, 14; EVIDENCE 23; EX'RS & ADM'RS 7.

BOOK ACCOUNT.

1. In an action on book account against two defendants, where the plaintiff presented a charge for money lent, it was held that he might prove, by the defendant to whom the money was delivered, that the defendants were partners at the time the money was lent, and that it was obtained upon the credit, and for the use of the firm. *Keeler et al. v. Matthews et al.*, 125.

2. An action on book account cannot be sustained, when no portion of the plaintiff's account against the defendant had become due at the time of the commencement of the action, although it was all due at the time of the hearing before the auditor. *Wetherell et al. v. Everts*, 219.
3. The case of *Martin v. Fairbanks*, 7 Vt. 97, explained, and its application limited. *Ib.*
4. Where one of two partners was individually indebted, and his creditor charged the debt to the firm, and informed both partners that he had done so, and subsequently the indebted partner delivered to the creditor property of the firm in payment of the debt, and this was known to the other partner, who also knew that the creditor supposed that he was receiving the property in payment for the debt, it was held, in an action on book account, brought by the firm against the creditor, and in which they claimed to recover for the property so delivered, that the creditor was entitled to be allowed for the charge thus made by him against the firm. *Miller et al. v. Dow*, 235.
5. Where items were charged in an account, which were not legitimate and proper subjects of a charge on book, and were stricken out before the commencement of the action upon the account,—which was brought before a justice of the peace,—it was held that the jurisdiction of the justice was not thereby affected. *Sheldon v. Flynn*, 238.
6. And if the defendant's account contain charges which accrued in payment of the items thus stricken from the plaintiff's account, it will be proper for the auditor to deduct such items from the amount of the defendant's charges of that character, and apply the balance, together with the remainder of the defendant's account, in offset to the plaintiff's account;—and the appellate jurisdiction of the county court will not be affected by the plaintiff's claiming that such deduction should be made. *Ib.*
7. The supreme court, upon a hearing upon an auditor's report, will not examine as to whether the auditor has drawn wrong conclusions as to the facts from the testimony before him, or whether he has made mistakes in the computation of interest, or whether he has neglected to report any facts which he was requested to report; these matters must be inquired into before the county court. *Hodges et al. v. Parker et al.*, 242.
8. Notwithstanding judgment to account is rendered against the defendant, in an action on book account, by default, yet, if it appears from the auditor's report that there is nothing due from the defendant to the plaintiff to balance book accounts between them, judgment upon the report will be rendered in favor of the defendant, for his costs. *Semb. Gordon v. Potter*, 348.
9. If the plaintiff's claim, in an action of assumpsit, is in the nature of book charges, and the defendant files a declaration on book account in offset, and the plaintiff, on the trial before the auditor, chooses to present his whole claim by way of an account in offset to the account presented by the defendant, and the auditor considers and decides upon the whole matter, and reports that there is a balance due from the plaintiff to the defendant, and that report is accepted by the county court, and judgment is rendered thereon in favor of the defendant, for the balance found due by the auditor, the plain-

- tiff's claim becomes thereby *res adjudicata*, and he cannot be allowed to prosecute his claim farther, on the trial of the original action; but judgment must be rendered therein for the defendant, for the balance found due to him on the declaration in offset. *Herrick v. Richardson*, 375.
10. Where, in such case, the plaintiff, in his declaration in the original suit, claimed for certain property, which had been delivered by him to the defendant, to be disposed of, and the account presented by the defendant before the auditor consisted mainly of charges for his services as agent, and for money paid by him to the plaintiff, as the avails of the property sold by him, and the plaintiff presented his whole claim before the auditor, to be passed upon by him, as an offset to the defendant's account, and the auditor considered the accounts upon both sides, as presented, and reported that there was a balance due to the defendant, it was held that the whole matter might thus be settled in the form of an action on book account. *Ib.*
 11. And if, in such case, the plaintiff's claim be not strictly of a nature proper to be settled in the action on book account, yet if the plaintiff himself have presented the claim before the auditor, and it has been adjudicated upon without objection on the part of the defendant, the plaintiff cannot afterwards claim, on the trial of the original action, that he is entitled to prove the same claim, upon the ground that it should properly have been settled in that form of action, rather than as a claim on book account. *Ib.*
 12. If the husband and wife are both parties to an action on book account, the wife is a competent witness on the trial before the auditor. *Andrus et ux. v. Foster*, 558.
 13. A bill of goods, sold, and paid for at the time of delivery, and receipted, cannot be reckoned as any part of the plaintiff's account, in determining the question of jurisdiction of an action of book account. *Nelson v. Emery*, 579.
 14. If, in an action on book account, against the agent of a voluntary association, brought by one with whom the agent contracted for the benefit of the association, written instruments were introduced and used as evidence before the auditor, which were objected to by the plaintiff as irrelevant, and which could, at most, have been only immaterial, but which might have had a tendency to show the relative situation of the parties, and that the defendant, in all he did, acted only as the agent of the association, this court will not reverse the judgment of the county court, accepting the auditor's report, for the reason that such writings were received. *Abbott v. Cobb*, 593.
 15. If an auditor, in an action on book account, decide a question of fact, and it appears, from his report, that there was any testimony before him tending to prove the fact as found by him, his decision is conclusive; but if he reports all the evidence, on which he based his finding, and that evidence has no tendency to prove the fact, his finding may be corrected by the court. *Hodges v. Hosford*, 615.
 16. Where several of the plaintiff's charges, in an action on book account, were for articles delivered to others on account of the defendant, and the on-

- ly proof, as to any order from the defendant for such delivery, was, that the person, to whom the goods were delivered, resided in the immediate neighborhood of the defendant, and was frequently employed to do errands for him, or that he resided in the neighborhood of the defendant and frequently labored for him, or that he resided in the family of the defendant, and there were other charges in the account for articles delivered to the same person, the correctness of which was not denied by the defendant, and the auditor, from this proof, in each case, found the fact that the defendant authorized the delivery of the articles, it was held, that, in each of these cases, the evidence had a *tendency* to prove the fact, and that therefore the finding of the auditor was conclusive. *Id.*
17. A settlement of book accounts, by the parties, is as conclusive as a judgment. In such case, it is not competent, in an action on book account between the parties, to examine the accounts, prior to the settlement, upon the mere *supposition* that a mistake exists; but the error must be first pointed out, and may then be corrected. *Id.*
18. The firm of F. & S. having an account against W., F. sold out his interest in the property and demands of the firm to E., and E. entered into partnership with S., and the business was conducted under the firm of E. & S.; after this and after E. & S. had ceased transacting business as partners, W. examined his account upon the books of F. & S., and admitted it to be correct, and consented that it might be charged to him upon the books of E. & S., and it was accordingly so charged; and it was held that E. & S. might, in an action on book account in their own names against W., recover the amount thus transferred from the books of F. & S. *Eaton et al. v. Whitcomb*, 641.
19. In such case, F. & S. having an account against W., S., who was a member of the firm, contracted with W. for a quantity of building materials, to be used by S. in the erection of a house which he was building for himself, and in which the firm of F. & S. had no interest, and agreed that the same, when furnished, should apply in payment of the account which F. & S. then had against W., and that the balance, which should be due for the materials, should be paid in goods out of the store of F. & S. W. knew that F. had no interest in the building on which these materials were to be used, but, relying upon this agreement on the part of S., furnished materials to S. to an amount exceeding the amount due from him to F. & S. F. sold out his interest in the property and demands of the firm of F. & S. to E., and E. entered into co-partnership with S., and the business was conducted under the firm of E. & S., and W. consented that the account standing against him on the books of F. & S. should be charged to him on the books of E. & S. W., after he had delivered to S. lumber sufficient to pay the account of F. & S. against him, continued to furnish materials to S., and from time to time, both before and after the firm of E. & S. had commenced, took goods from the store, intending to have them apply in payment for the lumber thus delivered by him to S., and which goods S. delivered to him, also, with the understanding that they were to apply in payment for such lumber. The lumber, &c., delivered by W. to S., was all delivered prior to the formation of the firm of E. & S. None of

this lumber was credited on the books of F. & S., or E. & S., and neither F. nor E. was aware but that the account against W., as it stood upon the books, was wholly due from W., they neither of them having any knowledge of the contract between S. and W. And it was held, in an action on book account, brought by E. & S. against W., that the contract thus made by S. was within the scope of his authority, as partner, and that the amount delivered to him by W. must offset against the account of E. & S. against him. *Ib.*

20. But, it appearing that W. had also delivered to E. & S. lumber &c. which was used for the benefit of the firm, and which was delivered expressly in payment of the account of the firm against him, it was also held that the amount thus delivered must be first offset against the account of the firm, and that then so much of the amount delivered by W. to S., under the above contract, as was necessary to balance the remainder of the account of the firm, should be offset against that account; and that W. was not entitled to recover against the firm any balance, for the property thus delivered to S., above what was necessary to balance the account of the firm, after first applying the items which accrued in express payment of the account of the firm, and of which the whole firm received the benefit. *Ib.*

See CONTRACT 1.

CASE, *See* ACTION ON THE CASE.

CERTIFICATE, *See* ACTIONS PENAL 1-3; CRIMINAL LAW 1, 2; EVIDENCE 28.

CHANCERY.

1. Although mere inadequacy of consideration in a contract will not, of itself, substantiate a charge of fraud, yet when *gross*, and connected with other circumstances of a suspicious character, it may furnish sufficient ground to induce a court of chancery to rescind the contract. *Howard v. Edgell et al.*, 9.
2. Where the parties agreed to change farms, and submitted to appraisers to determine the amount which should be paid as the difference between them, and it was provided in the submission that the value of the orator's farm should be called \$5000, and that, if, in the opinion of the appraisers, the orator's farm was overvalued, or undervalued, the defendant's farm should be valued in the same proportion, and the appraisers, in making their award, ascertained the *real value* of the farms, and hence deduced the difference to be paid, without regard to the value fixed for the orator's farm in the submission, it was held that the award was void, as not having followed the submission, and would be set aside by a court of equity. *Ib.*
3. An answer, responsive to the bill, and not asserting a right *affirmatively*, in opposition to the right claimed in the bill and independent of it, is proof of the facts stated in the answer. *Allen, Adm'r, v. Mower*, 61.
4. But, if the answer assert matter *affirmatively*, though it be responsive to the bill, *quære*, whether, upon a traverse, the answer shall be received as proof, or as mere pleading requiring to be proved. *Bennett, J. Ib.*

5. Though the intestate, in his lifetime, may have combined with the defendant to receive a transfer of certain *choses in action* belonging to the intestate, to avoid the trustee process and the rights of the intestate's creditors, yet, if he received from the defendant a full consideration therefor, a court of chancery will not decree that the defendant pay to the administrator the value thereof a second time, for the benefit of creditors, though the estate may be greatly insolvent. *Ib.*
6. Where the orator, an administrator, alleged in his bill that the intestate, in his lifetime, had delivered certain promissory notes to the defendant with the fraudulent intent of placing them out of the reach of the intestate's creditors, and that the defendant, participating in such intent, had received the notes, and still retained them, or the avails of them, wrongfully, and the fact appeared to be, that the defendant, for all notes so received by him, had paid a full consideration, so that he was not now liable for their amount, yet, it appearing that the defendant had received certain other notes of the intestate, in his lifetime, for collection, and had collected the amount due upon them, he was ordered to pay to the administrator the amount so collected, with interest and costs. *Allen, Adm'r, v. White, 69.*
7. A contract, by which the defendant agreed to deed certain lands to a married woman, on payment by her of a note executed by her husband, cannot be connected with other independent contracts or notes held by the defendant against the husband, so as to render the insolvency of the husband, or his inability to perform his contract, any excuse for the defendant in not performing his contract with the wife. *Washburn et ux. v. Dawey, 92.*
8. So the inconvenience to which it may put the defendant to part with the land, or the fact that the orators might have recovered damages at law for his non-performance, is no reason why a specific performance should not be decreed by a court of equity, when the wife has tendered performance of the contract upon her part. *Ib.*
9. A tender of performance of a condition precedent, as the payment of a note, entitles the party to a performance on the other side; and no farther offer is required, nor is it necessary to bring the money into court, until the defendant demands it. *Ib.*
10. A motion to dismiss a bill in chancery, because the matter in controversy does not exceed fifty dollars, should have been presented to, and acted on by, the chancellor, or it cannot be noticed in this court. *Ib.*
11. To authorize a court of equity to reform a written instrument, on the ground of mistake, the evidence showing the mistake must be strong, and of a conclusive character. *Preston v. Whitcomb, 183.*
12. Where arbitrators awarded that the orator should pay to the defendant a certain sum of money by a time specified, and that the defendant should, at the same time, execute to the orator a deed of certain premises, and the defendant, at the day, tendered to the orator the required deed, which the orator refused to accept, and the defendant thereupon commenced an action at law against the orator upon the award, and recovered judgment for the sum awarded to be paid to him and his costs, and afterwards the defendant sold

- and transferred the premises to a third person, receiving the value thereof the court enjoined the defendant from any farther proceedings to enforce payment of the judgment recovered by him at law, and ordered that he repay to the orator the amount of a payment which the orator had made to him towards the land prior to the award, and which was taken into consideration by the arbitrators, and also that he pay the orator's costs. But the defendant was allowed to deduct, from the payment to be made by him, the amount of his costs in the suit at law,—the court holding that that judgment was rightly recovered, as the facts then were. *Ib.*
13. In the case of a bond, conditioned that the obligor shall execute to the obligee a deed of certain premises upon payment, by a day named, of a specified sum of money and the interest thereon, it being understood between the parties before and at the time of the execution of the bond that the obligee had an equitable interest in the premises, and a right to redeem them by payment of the amount of the obligor's interest in them, and the obligee remains in possession of the premises, paying no rent, and he neglects to make the payment by the day named in the bond, a court of chancery will allow him to redeem by payment at a subsequent day, upon application made in proper season. *Smith v. Blaisdell et al.*, 199.
14. But if the obligee, having failed to make payment by the day named in the bond, surrender the possession of the premises to the obligor, and neglect to bring his bill to redeem for nearly six years, the court will grant no relief, *Ib.*
15. Where, to a clause for re-entry, in a lease, for non-payment of rent, there was attached a condition that the landlord should, before entering, give to the tenant in arrear thirty days notice, and the tenant conveyed his interest in the premises to a third person, but the grantee of the tenant permitted the tenant to retain the possession of the premises, and the tenant, by means of such possession, obtained a credit with the defendant, and procured the lessor to convey the premises to the defendant by perpetual lease, and the defendant executed to the tenant a bond, conditioned for the conveyance of his title to the tenant on payment of a certain sum by a day named, and the tenant, failing to make payment by the day named in the bond, surrendered the possession of the premises to the defendant, who entered, and retained the possession, claiming an absolute right thereto by virtue of the lease to him from the landlord, and the orator, who was assignee of the tenant's bond, and who had also purchased the title of the tenant's grantee, brought his bill to assert his right within six years from the time the defendant took possession of the premises, the court held that his right was not affected by the lapse of time, but that they would not allow him to redeem, without payment to the defendant of the sum originally advanced to the tenant by the defendant upon the credit of the premises, as specified in the condition of the bond; and the court refused to compel the defendant to account for the rents and profits during the time he had been in possession, and also refused to allow him interest upon his money during that time. *Ib.*
16. And this relief was granted to the orator, notwithstanding the deed from

- the tenant's grantee to the orator was executed at a time when the defendant was in adverse possession of the premises, claiming title thereto by virtue of his lease. *Ib.*
17. In this case the court refused to allow costs to the defendant,—he having contested the orator's right to redeem,—and they also refused to allow costs to the orator, as he had not, before bringing his bill, actually tendered to the defendant the amount due to him. *Ib.*
18. The practice of allowing a decree to pass in the court of chancery *sub silentio*, with a view to taking an appeal, commented upon. *Stafford v. Ballou et al.*, 329.
19. Whatever is sufficient to put a party upon inquiry is sufficient to affect him with notice of all those facts, which he might be presumed to have learned upon reasonable inquiry. *Ib.*
20. The court of chancery have no power to enjoin a judgment of the supreme court, where the ground for relief, set up in the orator's bill, is, that the supreme court, through haste, or inadvertence, rendered an erroneous decision. *Pettes et al. v. Bank of Whitehall*, 435.
21. When a party has committed a *tortious* act, in consequence of a mistake of law, and the other party was not in fault, a court of equity will not relieve him from the consequences of his acts. *Ib.*
22. In this case, a sheriff, who held an execution, discovered a defect in it, which he supposed rendered it void, and he therefore neglected to execute it; and it was held that a court of equity could not relieve him from the consequences of his neglect of duty,—judgment having been rendered against him therefor in a court of law. *Ib.*
23. The court of chancery will decree a set-off of debts, in fact mutual, although not so in form,—as when, on one side, the debts are joint, and, upon the other side, several,—if one of the joint debtors is a mere surety,—especially when he, from whom the several debt is due, and against whom the set-off is asked by the real debtor in the joint debt, is insolvent. *Downer v. Dana et al.*, 518.
24. A court of chancery will not set aside a conveyance, which is perfectly, fair, and when no undue advantage has been taken, provided the grantor had, at the time of executing the conveyance, sufficient understanding to know the nature and consequences of his act. *Day v. Seely et al.*, 542.
25. The burden of proof, in such case, is upon the party who seeks to avoid the conveyance. *Ib.*
26. Where it appeared that a mortgagor, at the time he executed the note and mortgage, comprehended well what he was doing and the consequences of his acts, the court of chancery held the mortgage valid, although it appeared quite probable that there had been times, previous to the execution of the mortgage, when he might not have had sufficient capacity,—the disease under which he suffered, and of which he ultimately died, being one of the brain, and one which would not, from its nature, be at all times uniform in its influence upon the understanding. *Ib.*

27. A decree of foreclosure, by a court of chancery, cannot be proved by the docket minutes of the court, merely; the decree itself, as drawn up and signed, or a copy of the record, if it have been enrolled, is the only legitimate evidence of the decree. *Austin v. Howe*, 654.

See MORTGAGE.

CHARGE TO THE JURY, See PRACTICE 5.

COLLECTOR, See TAXES; SCHOOLS.

COMPUTATION OF TIME, See WRIT OF REVIEW.

CONFESSION OF JUDGMENT, See APPEAL 1.

CONDITION.

1. A tender of performance of a condition precedent, as the payment of a note, entitles the party to a performance on the other side; and no farther offer is required, nor is it necessary to bring the money into court, until the defendant demands it. *Washburn et ux, v. Dewey*, 92.
2. A contract of sale, upon condition, vests no title in the vendee until the performance of such condition, unless the performance is waived. *Mansell, Adm'r, v. Briggs*, 176.
3. A mere mental determination to rest satisfied with the non-performance of such condition, not procured by the vendee nor notified to him, will not operate as a waiver of such condition, so as to vest the property in the article sold in the vendee. *Ib.*

CONSIDERATION, See BANKRUPTCY 2, 3; CHANCERY 1; CONTRACT.

CONSTABLE, See FEES; TAXES.

CONTRACT.

1. If G. and T. enter into an agreement, by which G. is to labor for T. and be boarded by him in a particular way, or at a certain place, G. has no right to procure his board in a different way, or at a place not designated between them, and charge T. therefor, without showing some failure in performance on the part of T. *Griffin v. Tyson*, 35.
2. A contract in contravention of the terms of a statute is void, although the statute inflict a penalty, only; because such penalty implies a prohibition. *Elkins v. Parkhurst*, 105.
3. A contract entered into to indemnify a sheriff for a past neglect is not void for illegality. *Hall v. Huntoon*, 244.
4. If one contract to labor for another for a specified term, and leave the service of his employer, before the expiration of the term, without any cause, attributable either to the employer, or to the act of providence, he cannot recover any compensation for the portion of the term during which he in fact labors. *Winn v. Southgate*, 355.
5. And it makes no difference that the employer, before the expiration of the

- terms, permitted the plaintiff to be absent from his employment for a few weeks upon a journey,—the plaintiff having, after his return, again resumed labor for his employer, under the contract. *Ib.*
6. Nor does it make any difference, that the plaintiff ceased laboring for his employer, under the belief, that, according to the legal method of computing time, under similar contracts, he had continued laboring as long as could be required of him. *Ib.*
 7. Nor that the employer, during the term, has from time to time made payments to the plaintiff for his labor. *Ib.*
 8. And if, in such case, the defendant have made payments to the plaintiff upon the contract, during the term, and the plaintiff, having commenced an action of book account to recover for his services, is defeated, upon the ground that he left the service of the defendant, without legal cause, before the expiration of the term, the defendant can have no recovery against the plaintiff for the amount of payments thus made. *Ib.*
 9. Where the defendant contracted to deliver to the plaintiffs thirty tons of starch per year for two years, it was held that the contract, though entire in its terms, was yet divisible in its character, and that the plaintiffs might, at the expiration of the first year, sustain an action against the defendant for any breach, on his part, of that portion of the contract that was to be performed that year. *Mixer et al. v. Williams, 457.*
 10. When in an action on contract, the testimony is all on paper, and is before the court, it becomes the duty of the court to instruct the jury, as a question of law, whether the testimony, all being true, proves the contract alleged,—and, if the contract is not proved, as alleged, to direct the jury to return a verdict for the defendant. *Ib.*
 11. In this case the testimony was, that the defendant, a starch manufacturer, authorized the plaintiffs, who were commission merchants in Lowell, to contract for him thirty tons of starch per year for two years, and that the plaintiffs, having previously contracted to deliver to the "Boot Mills," a corporation in Lowell, sixty tons of starch in one year, for thirty tons of which they had contracted with another starch manufacturer, thereupon appropriated the amount specified by the defendant for the first year to meet the remaining thirty tons to be delivered by them to the "Boot Mills," and notified the defendant that they had contracted his starch, as he had authorized them to do,—and it was held that this evidence did not support a declaration, in which the plaintiffs set forth the authority given them by the defendant and then alleged, that, relying upon that authority, and the promise of the defendant to deliver the starch according to its terms, they had contracted with the "Boot Mills," "and with certain other individuals and corporations in Lowell," for the sale and delivery to them of the quantity of starch mentioned by the defendant, to be delivered at the times and on the terms proposed by him. *Ib.*
 12. And it was farther held, that this evidence did not support a count in the declaration, which alleged that the defendant bargained and sold to the plain-

tiffs the amount of starch specified in his proposal to them, upon the terms and at the price mentioned by him. *Ib.*

13. And it was held that this second count was not supported by evidence that the plaintiffs, after they had given notice to the defendant that they had contracted his starch, prepared and forwarded by mail to the defendant a memorandum of an agreement, purporting to be an agreement by the defendant to deliver to the plaintiffs the quantity of starch specified by him, upon the proposed terms as to price and time of delivery, and requested him to sign and return the same, and that he wholly neglected to do so. *Ib.*
14. If one promise to indemnify another for all loss, damage and expense which he shall incur in giving up to the promissor a horse, which he has in his possession, and bringing a suit against the person of whom he purchased it, for fraudulently selling to him a horse belonging to another, on condition that he fail in such suit, and such action is commenced, and the plaintiff fails to recover, the record of the judgment in that action is competent evidence in an action against the promissor, founded upon the promise, notwithstanding no notice of the commencement or pendency of such prior action was given to the defendant. It is evidence against the defendant, to show the bringing and the failure of the action. *Lincoln v. Blanchard*, 464.
15. In an action on such contract the plaintiff would be entitled to recover, provided he proved that he commenced such prior action, and failed to recover in it; but the amount of damages, which he is entitled to recover, must depend upon the title to the horse, and as to that question, *Per REXFIELD, J.*, the judgment in the former action would seem to be *inter alios*, and not conclusive. *Ib.*
16. In such case the consideration is sufficient to support the contract, as being both a loss to the promisee and a benefit to the promissor. *Ib.*
17. In a declaration upon such contract, the allegation, that the plaintiff brought a suit against the person from whom he purchased the horse, is sufficient after verdict. It will be presumed that it was such a suit as was stipulated. *Ib.*

See ACTION 2, 3; AGENT 7; CHANCERY 1, 7, 8; PRACTICE 12; PROMISSORY NOTES 4, 9.

CORPORATION.

1. When a corporation is plaintiff in a suit, the chief officer of the corporation may make the affidavit, required, under section 63 of chapter 28 of the Revised Statutes, to entitle the plaintiff to take out an execution against the body of the defendant. *Sargeant, ex parte*, 425.
2. Where a person, professing to be the president of a corporation, has made an affidavit under that section of the statute, which affidavit has been received by the clerk, who has thereupon issued execution against the body of the defendant, the supreme court, upon *habeas corpus* brought by the defendant, will, in the absence of all testimony, presume such person to have been president of the corporation. *Ib.*

COSTS, *See* CHANCERY ; TRUSTER PROCESS.

COUNTERFEITING, *See* CRIMINAL LAW.

COURTS, *See* JURISDICTION.

COVENANT, *See* LANDLORD & TENANT.

COVERTURE, *See* HUSBAND & WIFE.

CRIMINAL LAW.

1. The omission by the clerk of the court to enter upon an indictment the minute required by statute of the "true day, month and year when the same was exhibited" is matter of abatement only, and, unless taken advantage of by the respondent before the plea of the general issue, must be considered as waived. *State v. Butler*, 145.
2. And it would seem that such minute would be sufficient, if made by the clerk, under the direction of the court, at any time during the term at which the indictment is exhibited. *Ib.*
3. An indictment, charging one as accessory after the fact, under the 11th section of chapter 102 of the Revised Statutes, must allege that the respondent did not stand in any of those relations to the principal offender, which are excepted from the operation of the statute in the enacting clause. *Ib.*
4. But, *Per* REDFIELD, J., if the matter of exception be contained in a separate section of the statute, or in a proviso, or exception, distinct from the enacting clause, the fact that the respondent is within the exception is matter of defence merely, and the contrary need not be alleged in the indictment. *Ib.*
5. Under the Revised Statutes of this state the principal offender and the accessory may be indicted together; but *quære*, whether it is competent to charge one as accessory, both *before* and *after* the fact, in the same indictment with the principal, and in the same count. *Ib.*
6. But in this case that portion of the indictment, which attempted to charge the accessory with being such *after the fact*, being defective, was treated as surplusage, and the indictment treated as one against the principal and an accessory *before the fact*, and therefore sufficient. *Ib.*
7. The expression, in an indictment for passing a counterfeit bank bill, that the bill "was made in imitation of, and did then and there purport to be, a bank note, for the sum of five dollars, issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the Legislature of the State of Maine, one of the United States of America," is a sufficient averment of the existence of such bank, and that it is an incorporated institution. *State v. Wilkins*, 151.
8. The words "bank bill" and "promissory note," in the fourth section of the statute,—Rev. St. c. 96, § 4,—which provides against the offence of passing counterfeit bank bills, are synonymous; so the words "bank note" have the

- same signification; and an indictment, which charges a respondent with having uttered a counterfeit "*bank note*," is sufficient, within that section. *Ib.*
9. Under the fourth section of chapter 96 of the Revised Statutes, the *uttering, passing and giving in payment* a counterfeit bank bill are distinct offences; and an indictment for *uttering and passing* such bill, averring the knowledge of the respondent that the bill was counterfeit, is sufficient, though it do not allege that the respondent uttered and passed it *as a true bill*. *Ib.*
10. The allegation, in an indictment for passing a counterfeit bank bill, that the bill passed "*was made in imitation of, and did then and there purport to be, a bank note for the sum of five dollars, issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the Legislature of the State of Maine,*" is merely an allegation that the bill was fictitious, and is not an attempt to set forth the bill according to its legal effect and *purport*, in such way as to lay the foundation for a variance between the allegation and the *terms* of the bill. *Ib.*
11. It is discretionary with the Supreme Court, after they have adjudged an indictment sufficient upon demurrer, to allow the respondent to plead anew, and remand the case to the county court for trial, or not. *Ib.*
12. If resistance be made to the making of an attachment, the persons resisting will not be allowed, on trial of an indictment against them therefor, to prove, in defence, that the process, upon which the attachment was about being made, was sued out by connivance of the plaintiff and defendant therein and of the officer, and was intended to be used by them for the purpose of placing the property attached, which belonged to one of the respondents, in the hands of insolvent and irresponsible persons, so as to deprive the owner of his property, or fraudulently compel him to pay money in order to regain the possession of it. *State v. Buchanan, et al., 573.*
13. An indictment, which alleged, in the first count, that the respondent made an assault upon one Smith, the said Smith "*then and there being sheriff of said county of Addison,*" and which charged him, in the second count, with having "*hindered and impeded a civil officer, under the authority of this State, to wit, Adnah Smith, sheriff of the county of Addison aforesaid,*" and which alleged, in both counts, that the said Smith was, at the time, in the "*execution of his said office,*" was held to allege, with sufficient certainty, in both counts, that said Smith was sheriff of Addison county. *State v. Hooker, 658.*
14. And if it be alleged, in such indictment, that the sheriff, at the time of the said assault and impeding, had in his hands a writ of execution against the respondent, which issued on civil process, and that he was about to execute the same by arresting thereon the body of the respondent, it is not necessary to allege that he had demanded of the respondent payment of the sum due on the execution. *Ib.*
15. And where it was alleged in the indictment, in such case, that the execution was dated the 27th of September, and that it was delivered to the sheriff while it was in full life, on the 6th day of October, and that it was attempted to be served on the 7th day of November, and that it was made returnable in

sixty days from its date, it was held that it sufficiently appeared that the execution was delivered to the sheriff within sixty days after its date, and that the sheriff attempted to execute it within its life. *Ib.*

16. And the allegation that the said Smith was in the execution of his duty as sheriff, and that, for want of property, on which to levy the execution, he attempted to serve and execute said writ of execution, as he was therein commanded, by arresting the body of the respondent, and that the respondent then and there, well knowing that said Smith was sheriff of the county of Addison, and that he then and there had said writ of execution to serve and execute and was then and there attempting to serve and execute the same, did then and there impede and hinder the said Smith, while attempting to serve and execute said writ of execution, was held as sufficiently averring that the sheriff had the execution in his hands at the time the resistance was made. *Ib.*
17. And it is unnecessary to allege, in such indictment, the *place*, at which the execution was delivered to the sheriff. *Ib.*
18. And, after a general verdict of guilty, it is no objection to the indictment, on motion in arrest, that offences of different grades, and requiring different punishments, are charged in the different counts. If any one or more of the counts are sufficient, the court will render judgment upon such counts; and if all the counts are sufficient, judgment will be rendered upon the count charging the highest offence. *Ib.*
19. If a hearing be had before a magistrate, upon the complaint of a town grand juror charging a person with the commission of a crime, and the respondent be, by the magistrate, bound over for trial by the county court, and an indictment be found against him, and, before a trial is had upon the indictment, a witness, who testified before the magistrate, dies, evidence may be received, on trial upon the indictment, to prove what that witness testified before the magistrate. *Ib.*
20. And it is not necessary, on such trial, to prove the exact language used by the witness in giving his testimony before the magistrate; it is sufficient, if the substance of his testimony, as there given, be detailed. *Ib.*
21. If a sheriff, in attempting to execute a writ of execution on civil process, which is delivered to him to be levied, break open the outer door of the dwelling house of the execution debtor, where the debtor then is, with a view of arresting the body of the debtor on the execution, such act is unlawful; and if, after the sheriff has entered the house, the debtor forcibly resist the attempt of the sheriff to arrest him, and commit an assault and battery upon the sheriff, an indictment will not lie against the debtor for so doing. *Ib.*

DAMAGES, See CONTRACT 14; RECOGNIZANCE 7; TRESPASS 8.

DEBT.

1. Where, in an action brought before a justice of the peace upon a judgment for less than \$100, but which, with the interest upon it, would exceed \$100, the declaration described the judgment correctly, and concluded, generally,

"to the damage of the plaintiff, as he says, one hundred dollars," and in the county court the plaintiff filed a new declaration, claiming to recover the debt only, and making no claim for damages, it was held that the action should not be dismissed for want of jurisdiction in the justice before whom it was originally commenced. *Parkhurst v. Spalding*, 527.

See PLEADING 5, 7-10.

DEBTOR AND CREDITOR, See ASSIGNMENT.

DECLARATION, See PLEADING.

DECLARATION IN OFFSET, See BOOK ACCOUNT 9, 10, 11.

DEED.

1. The heir of an intestate has, immediately on the death of the ancestor, a vested interest in his estate, which may be conveyed by deed. *Hyde v. Barney*, 280.
2. If the heir be a *feme covert*, her husband has an interest in the real estate, as tenant by the curtesy, which may be conveyed, or which may be taken for his debts. *Ib.*
3. When there is no latent ambiguity in a deed, the intention of the parties must be ascertained from the instrument itself, and cannot be shown by parol evidence. *Fingry v. Watkins*, 379.

See EVIDENCE 23; TAXES.

DEFAMATION, See SLANDER.

DEMAND, See PROMISSORY NOTES 1, 6; TENDER 2.

DEMURRER, See PLEADING.

DEPOSITION.

1. When a deposition is taken *ex parte*, the magistrate must certify the reason why the other party was not notified; and the court cannot judicially take notice of any facts, as a reason for omitting to notify the party, which do not appear from the certificate. *Hopkinson, Adm'r, v. Watson et ux., Adm'rs*, 91.
2. The omission, in the certificate, of the initial letter of the middle name of a party is no reason for rejecting the deposition, when the party is, in other respects, correctly described. *Ib.*
3. In the caption of a deposition all parties, both plaintiffs and defendants, must be individually and correctly named. *Haskins v. Smith et al.*, 263.
4. Where a deposition was taken and filed, to be used as evidence in a suit, and the original deposition was destroyed by accident, it was held that a copy of the deposition,—the witness being still living,—could not be used as evidence on the trial. *Follett et al. v. Murray et al. & Tr.*, 530.

See EVIDENCE 19.

DEVISE.

1. Under a clause in a devise, which provides that the devisees may have, use and possess during their natural lives certain premises described, they paying the rents and taxes thereon, the devisees take an estate for life, which it is competent for them to assign, or convey. *Nason v. Blaisdell*, 216.

DWELLING HOUSE, *See* EXECUTION 5.

EJECTMENT.

1. An administrator may maintain an action for the recovery of the possession of real estate, for the use of the heirs, until after a decree of distribution has been made by the probate court. And in this respect it makes no difference whether the descent was cast under the statute of 1797, or under the statute of 1821. *McFarland, Adm'r, v. Stone*, 165.
2. But the administrator can only recover, in such case, according to the rights of the heirs at the commencement of the action; and if the rights of some of the heirs are barred by the statute of limitations, and the rights of others are saved by their being under certain disabilities, the recovery will be of those shares, only, which are not lost. *Ib.*
3. And in such case, the defendant having acquired a title by possession as against some of the heirs, the remaining heirs, whose rights are saved from the operation of the statute, will be tenants in common with the defendant. *Ib.*
4. A disability, to save the operation of the statute of limitations in regard to real estate, must exist in the heir at the time the right, or title, first descends to him. Hence successive disabilities, though existing in the same person, cannot exempt his right from the operation of the statute. *Ib.*
5. The doctrine of presumptive grants cannot be applied to a case, which is within either the enacting or saving clause of the statute of limitations; it applies only to cases which are not strictly within the statute. *Ib.*
6. In case of tenancy in common of real estate, the right of part of the tenants to recover in ejectment is not affected by the fact that the rights of their co-tenants are barred by the operation of the statute of limitations. *Ib.*
7. Any entry upon land, which puts in operation the statute of limitations against him whose right is superior, creates an ouster. *Ib.*
8. *It seems*, that in ejectment, where the defence is adverse possession founded on claim of title, the statute of limitations will bar all claim for the recovery of the rents and profits, which accrued more than six years prior to the commencement of the plaintiff's action. *Ib.*
9. A deed of land from one out of possession, which is void, under the statute of 1807, by reason of the adverse possession of a third person, will not affect the right of the grantor in such deed to maintain an action of ejectment against such third person. *Nason v. Blaisdell*, 216.
10. Where the plaintiff, in an action of ejectment, proved that he had good title to the demanded premises, as against the defendants, who were strangers in

possession of the premises, and, after the testimony on the part of the plaintiff was closed, and during a recess taken by the court, the defendants procured and put upon record an assignment to themselves of an outstanding mortgage of the premises, executed by the grantor of the plaintiff to a third person, which had become absolute through non-performance of the condition thereof, and the plaintiff thereupon, before the trial was resumed, tendered to the defendants the amount due upon said mortgage, and brought the money into court, and, after the mortgage deed and assignment had been given in evidence by the defendants, offered to prove the fact of the tender, it was held that that evidence should be received by the court, and that the effect of the tender was to deprive the defendants of the right to defend under the mortgage deed. *Downer v. Bowman et al.*, 417.

11. The defendant, in an action of ejectment, is liable, if he were in possession of the demanded premises at the time of the commencement of the plaintiff's action; and for this purpose the time of the service of the writ is to be treated as the commencement of the action. *McDaniels v. Read et al.*, 674.
12. And actual possession by the defendant is not necessary; it is sufficient if the defendant have a deed of the premises, which has been recorded in the town clerk's office of the town where the land lies, and claims to have purchased the premises. *Ib.*
13. So the plaintiff, in ejectment, must also have a right of action at the time of final judgment. If, therefore, the action be founded upon a mortgage, and the defendant, at any time before final judgment, tender to the plaintiff the amount due upon the debt secured by the mortgage and the costs in the action of ejectment, the plaintiff's right of action upon the mortgage is taken away, and he can no longer claim judgment in his favor in the ejectment. *Ib.*
14. And if the plaintiff, in such case, claim title to the demanded premises by virtue of several mortgage deeds, which describe distinct parcels of land, and were given to secure distinct debts, the tender may be made of the amount due upon the debts secured by part of the mortgage deeds, and the plaintiff's right of action, as to the premises described in those deeds, will thereby be taken away; and it makes no difference, in this respect, whether the deeds were originally executed to different individuals, and have come to the present plaintiff by assignment, or, *Per* HEBARD, J., whether they were all originally given to the plaintiff. *Ib.*
15. And it is not necessary, that the defendant, in such case, having made a legal tender, should show that the tender has been kept good, and bring the money into court; it is sufficient, to entitle him to a recovery, for him to prove the making of the tender, and the refusal, on the part of the plaintiff, to receive it. *Ib.*

See BETTERMENTS.

ERROR, *See* AUDITA QUERELA.

ESTOPPEL.

1. An execution debtor is estopped from denying, on *habeas corpus*, the existence,

or corporate capacity, of the plaintiff, in whose name the judgment against him was recovered. *Sargeant, ex parte*, 425.

2. A person is always estopped from denying the truth of a fact, upon the faith of which he has suffered another person to act, knowing at the time that the other's conduct was materially influenced by a reliance upon the truth of such fact. This is almost the only ground of an estoppel in *pais*. *Hicks et al. v. Cram et al.*, 449

See PLEADING.

EVIDENCE.

1. Where a creditor puts a writ of attachment against his debtor into the hands of a sheriff, and directs the sheriff to attach certain property as the property of the debtor, and tenders to him a suitable bond of indemnity for so doing, and the sheriff refuses to attach the property, and the property was in fact the property of a person other than the debtor, the real owner of the property is a competent witness for the sheriff, in a suit brought against him by the creditor for such refusal. *Hutchinson et al. v. Lull*, 133.
2. In an action against a sheriff, for the default of his deputy, a release from the sheriff to the deputy of all liability on account of such default will render the deputy a competent witness for the sheriff; and, if the sheriff have received an indemnity from a third person for giving such release, a release from such third person to the deputy of all liability to him will render the deputy a competent witness for the sheriff. *Ib*.
3. Where an action on a jail bond was prosecuted in the name of the sheriff, to whom it was taken, and judgment was rendered for the plaintiff therein, and the county court refused to stay execution, and the defendant in that action paid the amount of the judgment, and subsequently the judgment was reversed, and final judgment was rendered in favor of the defendant, it was held, in an action brought by that defendant against the sheriff, to recover back the money so paid, that the sheriff might prove that he had no interest in that suit, and never received any portion of the money so paid, but that the action was prosecuted by one who claimed to own said bond by purchase, and that this fact was known to the defendant in that suit, and that the plaintiff in interest received the money so paid by the defendant; and these facts were held a valid defence for the sheriff in this action. *Cotton v. Allen*, 158.
4. And it was held that the attorneys of record for the plaintiff in the former suit were competent witnesses for the sheriff, in this suit, to prove those facts. *Ib*.
5. Proof of payment of usurious interest upon a note affords only presumptive evidence that a previous usurious agreement had been made; and the court, even if they presume that an usurious agreement was made, will not proceed farther, and, from that fact, presume that that agreement was made when the money was loaned; and that testimony alone, unaccompanied by other circumstances, will not be submitted to the jury to weigh. *Adm'r of Hammond v. Smith*, 231.

6. A presumption cannot be based upon a presumption. *Ib.*
7. Where, in an action for slanderous words, there was an attempt on the part of the defendant to impeach the credit of the witnesses by whom the speaking was proved, it was held that the plaintiff was entitled to prove, as tending to sustain the credibility of the witnesses, that the witnesses resided in the State of New York, and that the defendant had, by *solicitation, money, and threats*, endeavored to induce them to decline attending court and testifying in the case. *HEBARD, J., dissenting. Kirkaldie v. Page, 256.*
8. But such testimony would not be admissible, to prove *malice* on the part of the defendant. *Ib.*
9. The receptor of property attached is not a competent witness for the defendant in the same suit, when the property attached has been, by the receptor, suffered to remain in the defendant's possession. *Haskins v. Smith et al., 263.*
10. And the presumption will be, that the property has remained in the defendant's possession, unless the contrary is shown. *Ib.*
11. And the court, in such case, have no authority to allow the defendant to pay to the clerk of the court a sum equal to the receptor's liability to the attaching officer, and then discharge the attachment, or the attaching officer's liability, so as to render the receptor a competent witness. *Ib.*
12. Neither the declarations of the payee of a note, as to payments made to him by the maker, nor a receipt signed by him, acknowledging such payment, made at a time when he was not holder of the note, are competent evidence for the maker of the note, in an action brought against him by an indorsee, when the payee is alive and can be produced as a witness. *Washburn et al. v. Ramsdell, 299.*
13. One, who has assigned and transferred personal property to his creditor in payment of a debt, is a competent witness for the creditor, in an action of trespass brought by him against other creditors of the same person, who have attached and taken from the plaintiff's possession the assigned property, notwithstanding the officer, who served the defendant's writs of attachment, included in his fees minuted upon the writs charges for taking and securing the property in question. *Ellis v. Howard et al., 330.*
14. The declarations of the vendor of personal property, as to the character of the sale made by him, are not evidence against the vendee, in an action of trespass brought by the vendee against the creditors of the vendor, who have attached the property as belonging to the vendor, notwithstanding such declarations were made before the attachment, and while the vendor still retained the property in his possession. *Ib.*
15. Any fact, which should be matter of record, should be proved by the record. *Sherwin v. Bugbee, 337.*
16. When there is no *latent* ambiguity in a deed, the intention of the parties must be ascertained, from the instrument itself, and cannot be shown by parol evidence. *Pingry v. Watkins, 379.*
17. Where an assignment of dower and other records in the office of the pro-

bate court are referred to as part of the description of premises in a conveyance of real estate, they may be used as evidence in court, for the purpose of identifying the premises conveyed, notwithstanding they may never have been recorded in the office of the town clerk of the town in which the land lies. *Id.*

18. In an action brought by a creditor against a sheriff, for neglect of duty in not attaching, as the property of his debtor, certain property designated, in which the defence set up by the sheriff is, that the property did not belong to the debtor, but to a third person, and it appeared, on trial, that such third person had made a conditional sale of the property to the debtor, it was held, that the declarations of the debtor, made while he was in possession of the property, that the property belonged to him, and evidence that these declarations were known to the vendor, and that he, with such knowledge, also affirmed that he had sold the property to the debtor, were not admissible as evidence on the part of the plaintiff. *Deming et al v. Lull*, 398.
19. If a witness, in a deposition, introduce his testimony by detailing a statement made by a person not a party to the suit, and then say that the party, against whom the testimony is offered, "affirmed all that the other person had said," the deposition is admissible in evidence. *Hicks et al. v. Cram et al.*, 449.
20. A witness, not a professional man, may give his *opinion* in evidence, in connection with the facts upon which his opinion is founded, and as derived from them; though, *Per BENNETT, J.*, he could not be allowed to give his opinion, founded upon facts proved by other witnesses. *Morse v. Crawford*, 499.
21. Where a town voted to hold their town meetings at the house of the plaintiff, who was one of the inhabitants of the town, and, at the town meeting at which the vote was taken, it was publicly stated, in the hearing of the plaintiff, that he would ask nothing for the use of his house, only that the select men should grant him a license to sell liquor, on town meeting days, at his house, and the plaintiff made no objection, at the time this statement was made, it was held that proof of this, coupled with evidence that the plaintiff did afterwards usually take a license to sell liquor at his house on town meeting days, would justify the conclusion that the plaintiff so understood the terms upon which the meetings were to be held at his house, and that he had, therefore, no right to claim payment from the town for the use of his house, unless he had subsequently revoked the license, and given the town notice that he should claim pay. *Orcutt v. Roxbury*, 524.
22. The widow of a mortgagor is directly interested to defeat the mortgage; and she is, therefore, an incompetent witness for the defendants, in a bill brought to foreclose the mortgage, to prove that the mortgagor was insane at the time he executed the mortgage. *Day v. Seely et al.*, 542.
23. When a bond, or deed, comes in question incidentally, and solely for the purpose of proving that such an instrument was executed, its execution need not be proved by the subscribing witnesses,—nor, *Per WILLIAMS, CH. J.*, is its production necessary. *Chandler v. Caswell*, 580.

24. Where, in order to prove that the collector of a land tax had executed a bond to the committee appointed to superintend the expenditure of the tax, as required by statute, the bond itself was produced, it was held that its execution might be proved by one of the committee, to whom it was executed, and that it was not necessary to call the subscribing witnesses, although they were living, and within reach of process. *Id.*
25. If a note, taken by an officer from the receiptor of property attached, in satisfaction of the receiptor's liability for having permitted the property to be wasted, and made payable to a third person or bearer, be sued in the name of a mere trustee, for the benefit of the officer, the officer, by an absolute and unconditional conveyance of his interest in the note to such trustee, taking back from the trustee a release from all liability on account of the suit, although such conveyance and release are wholly without consideration, is so divested of interest in the suit, as to become a competent witness for the plaintiff. *Boardman v. Roger et al.*, 589.
26. If an action be brought against the agent of a voluntary association, by one with whom he contracted for the benefit of the association, to recover for services rendered in pursuance of such contract, the individual members of the association are competent witnesses for the defendant,—their interest being equally balanced. *Abbott v. Cobb*, 593.
27. If, in such case, written instruments were introduced and used as evidence before the auditor, which were objected to by the plaintiff as irrelevant, and which could, at most, have been only immaterial, but which might have had a tendency to show the relative situation of the parties, and that the defendant, in all he did, acted only as the agent of the association, this court will not reverse the judgment of the county court, accepting the auditor's report, for the reason that such writings were received. *Id.*
28. When the time of recording a paper in the town clerk's office is rendered material by statute, the town clerk's certificate, showing the time when it was in fact recorded, is competent evidence as to that point. *Purdet v. Sandgate*, 619.
29. A decree of foreclosure, by a court of chancery, cannot be proved by the docket minutes of the court, merely; the decree itself, as drawn up and signed, or a copy of the record, if it have been enrolled, is the only legitimate evidence of the decree. *Austin v. Howe*, 654.
30. If a hearing be had before a magistrate, upon the complaint of a town grand juror charging a person with the commission of a crime, and the respondent be, by the magistrate, bound over for trial by the county court, and an indictment be found against him, and, before a trial is had upon the indictment, a witness, who testified before the magistrate, dies, evidence may be received, on trial upon the indictment, to prove what that witness testified before the magistrate. *State v. Hooker*, 658.
31. And it is not necessary, on such trial, to prove the exact language used by

the witness in giving his testimony before the magistrate; it is sufficient, if the substance of his testimony, as there given, be detailed. *Ib.*

See ATTACHMENT 9, 11; BANKRUPTCY 4; BETTERMENTS; BOOK ACCOUNT 1, 16; CHANCERY; CONTRACT 13; LANDLORD & TENANT 6; PARTNERSHIP 4, 5; POOR 10; RECOGNIZANCE 6, 8; SCHOOL DISTRICT 2; TAXES 4.

EXCEPTIONS.

1. Where one summoned as trustee is adjudged trustee by the county court, the principal debtor in the case may file and prosecute exceptions to such decisions. *Hurlburt v. Hicks & Tr.*, 193.
2. When the testimony offered and admitted in the court below was objected to, and the question presented upon the bill of exceptions is whether the testimony tended to support the declaration, the supreme court will not examine into the sufficiency of the declaration, but will affirm the judgment, if the testimony was pertinent to the issue. *Onion v. Fullerton*, 359.
3. When it appears from the whole case, as stated in the bill of exceptions, that the plaintiff is entitled to recover, the case will not be remanded for a new trial, though evidence, offered by the defendant in the court below, may have been rejected improperly under the view there taken of the case by the parties and the court. *Morse v. Crawford*, 499.
4. *Quere*, Whether the proceedings of the county court, upon a petition founded upon the statute requiring persons, being of ability, to support their kindred, within certain degrees of relationship, can be revised upon exceptions. *Timmons v. Warren et al.*, 606.

See BANKRUPTCY 6.

EXECUTION.

1. In a return of a levy of an execution upon real estate, a reference, for a description of the land, to deeds upon record, which contain a proper description is sufficient. *Hyde v. Barney*, 280.
2. A defect in a levy of execution upon the undivided interest of an heir in the real estate of the ancestor, in not stating the amount of the interest of such heir in the estate, is, at most, a mere defect in form, which will be cured, after the lapse of two years, without action by either party, under the statute of 1837. (Rev. St., c. 42, §§ 43, 44.) *Ib.*
3. When a corporation is plaintiff in a suit, the chief officer of the corporation may make the affidavit, required, under section 63 of chapter 28 of the Revised Statutes, to entitle the plaintiff to take out an execution against the body of the defendant. *Sargeant, ex parte*, 425.
4. Where a person, professing to be the president of a corporation, has made an affidavit under that section of the statute, which affidavit has been received by the clerk, who has thereupon issued execution against the body of the defendant, the supreme court, upon *habeas corpus* brought by the defendant, will, in the absence of all testimony, presume such person to have been president of the corporation. *Ib.*

5. If a sheriff, in attempting to execute a writ of execution on civil process, which is delivered to him to be levied, break open the outer door of the dwelling house of the execution debtor, where the debtor then is, with a view of arresting the body of the debtor on the execution, such act is unlawful; and if, after the sheriff has entered the house, the debtor forcibly resist the attempt of the sheriff to arrest him, and commit an assault and battery upon the sheriff, an indictment will not lie against the debtor for so doing. *State v. Hooker*, 658.

See AUDITA QUERELA 2, 3.

EXECUTORS AND ADMINISTRATORS.

1. The statute,—Rev. St. 275, § 39,—giving an action to the executor, or administrator, where there has been a fraudulent conveyance to the injury of creditors, extends only to cases where the fraud would, without such action, prove prejudicial to the assets of the estate. *Allen, Adm'r, v. Mower*, 61.
2. The legality of the appointment of an administrator by the probate court cannot be inquired into in any other court, nor collaterally questioned in any way. *McFarland, Adm'r, v. Stone*, 165.
3. An administrator may maintain an action for the recovery of the possession of real estate, for the use of the heirs, until after a decree of distribution has been made by the probate court. And in this respect it makes no difference whether the descent was cast under the statute of 1797, or under the statute of 1821. *Ib.*
4. But the administrator can only recover, in such case, according to the rights of the heirs at the commencement of the action; and if the rights of some of the heirs are barred by the statute of limitations, and the rights of others are saved by their being under certain disabilities, the recovery will be of those shares, only, which are not lost. *Ib.*
5. An administrator, suing in trover, may always declare in his representative capacity, when the property belongs to the estate. And, *Per REDFIELD, J.*, if he has once had actual possession of the property, he may maintain an action of trover for it in his own name. *Mannell, Adm'r, v. Briggs*, 176.
6. An administrator, who is out of possession of real estate, whether disseized, or having surrendered the possession to the heir, can neither maintain trespass, nor an action on the case, in behalf of the heir, for an act which is a damage to the inheritance. *Lyman et al., Admrs., v. Webber*, 489.
7. If, in a declaration upon an administrator's bond, the breach assigned be the non payment of a debt allowed by the commissioners against the estate, the creditor must at least set forth so much in his declaration, as will show that the administrator was liable to pay the whole debt. It is not sufficient to allege that there was a large amount of property that belonged to the estate, "and more than sufficient to pay all debts allowed by the commissioners against the estate, and all charges and expenses of administering on the same." And if the estate be in fact insolvent, the declaration must show that an order of distribution and payment has been made by the probate court. *Probate Court v. Saxton*, 623.

8. A lessor by perpetual lease, reserving rent, has an assignable interest in the estate; and if he assign his interest to one as administrator of the estate of a deceased person, such administrator will hold that interest, as assets of the estate, in the same manner and for the same purpose that he holds the other property of the estate, and subject to the same order of the probate court. *Shaw, Adm'r, v. Partridge*, 626.

See CHANCERY 6.

FEES.

1. Under sect. 8 of chap. 107 of the Revised Statutes, *all officers*, who perform services for which no fee is specially allowed by statute, are entitled to charge therefor such sum as shall be in proportion to the fees established by law; the right to compensation for such service is not confined to clerks and recording officers merely. *Henry v. Tilson*, 479.
2. An officer, who receives illegal fees, is liable to the penalty imposed by sect. 16 of chap. 106 of the Revised Statutes, whether such fees are received for services for which a fixed compensation is given by law, or for services not specified in the fee bill, and for which compensation is allowed under sect. 8 of chap. 107 of the Revised Statutes. *Id.*
3. But an officer, who receives illegal fees, is not liable to the penalty imposed by sec. 16 of chap. 106 of the Revised Statutes, unless he received such illegal fees *knowingly*. In this respect the sixteenth section must have the same construction with the fourteenth and fifteenth sections. *Id.*
4. A constable, who commits a person to jail by virtue of a tax warrant, is only entitled to charge fees for actual travel, one way, in the commitment,—there being no return necessary. *Id.*
5. But if a constable receive fees for travel from the place of commitment to the office of the treasurer, to whom he is required to pay the tax, when collected, he is entitled to prove, in an action brought against him to recover the penalty given by statute for receiving illegal fees, that it had been the usual practice of collectors of taxes to charge such fees. *Id.*
6. A charge for the conveyance to jail of a prisoner, who is committed upon a tax warrant, or in a case of commitment for debt, is not ordinarily allowable,—that being included in the fee given to the officer for travel. *Id.*

FIXTURES.

1. Buildings, erected for a temporary use, or barns, erected by persons other than the owner, and not intended for permanent fixtures, may, in some cases, be considered and treated as personal property; but, as between vendor and vendee, heir and executor, mortgagor and mortgagee, all buildings which enhance the value of the estate, and are designed to be occupied by the owner thereof, agreeable to the principles of the common law, become a part of the realty, and pass with it by deed, or by descent. *Leland, Adm'r, v. Gassett*, 403.
2. Where a father permitted his son to enter upon a farm belonging to the father, and make improvements and erections, and carry on the same for his own

use and benefit, promising him that he would, at some time thereafter, give to him a deed of the farm, and the son went on, and, at his own expense, erected a house and barn upon the premises, and, after carrying on the premises for some years for his own benefit, died, and the father refused to convey to the administrator of the son the farm, or to permit him to occupy the buildings where they stood, or to remove them from the premises, and the jury, under the charge of the court, must have found that the buildings were erected with a view to their being permanent, and remaining on the land, and being occupied by the son as part of the estate to be deeded to him thereafter, it was held that the buildings became a part of the realty, and could not be considered as personal estate for which the father could be made accountable in an action of trover brought by the son's administrator. *Ib.*

3. If personal property be attached by a third person to a building, of which such third person is the owner, and used as part of the furniture of the building, for the convenience of the business of its occupants, but be attached in such manner, that it can be removed without injury to the building, and without injury to the property, it does not thereby become a part of the freehold, so as to pass by deed from the owner of the building to a purchaser of the premises. *Cross v. Marston*, 533.
4. And though the owner of the chattel may have had knowledge of its being placed, by the owner of the building, in the situation in which it was, and may have permitted it to remain in such situation, without reclaiming it, for a period of five years, and until after the owner of the freehold has sold and conveyed, it with its appurtenances, to a stranger, yet the owner of the chattel has not thereby lost his right to reclaim it, but may maintain trover for it against the purchaser of the building. *Ib.*
5. The question, in such case, is, whether the chattel have, by the manner of its annexation to the freehold, so far lost its *identity*, as to cease to have a legal existence as *personal property*; and if it have not, there can be no *inference* of acquiescence, on the part of the owner, in its becoming a fixture, if he have not stood by, and seen it sold to the purchaser, without objection. *Ib.*
6. In this case, a case of drawers and the sash of a show case were, by the consent of the owner of them, placed in a building, which the owner of the building was fitting up for a book store, and were, by the owner of the building, fastened in their places with nails, but in such manner, that they could be removed without injury to them, or to the building; the owner of the building then leased it for a book store, and it was occupied as such for five years, with the drawers and sash remaining as they were, when placed there, and then the owner of the building sold and conveyed it, by warrantee deed, with the appurtenances, to one who had, for four years, occupied it as a book store under a lease; and it was held that the drawers and sash still remained the personal property of the original owner of them, and that he might maintain trover for them against the purchaser of the building. *Ib.*

FOREIGN ATTACHMENT, *See* TRUSTEE PROCESS.

FOREIGN JUDGMENT, *See* JUDGMENT.

FORGERY, *See* CRIMINAL LAW.

FRAUD, *See* ACTION 6; ACTIONS PENAL; CHANCERY 1; EX'RS & ADM'RS 1; SALE.

FRAUDULENT CONVEYANCE, *See* ACTIONS PENAL.

GUARDIAN.

1. The statute of limitations is not applicable to the account of a guardian against his ward, while the relation subsists; and, after its termination, lapse of time will not bar the guardian's claim, when the delay is sufficiently explained by the circumstances of the case. *Kimball v. Ives, Adm'r*, 430.
2. Where a guardian presented an account against the estate of his ward, more than twenty years after the ward became of age, and it appeared that all the property of the ward had, from the time of the appointment of the guardian, continued in the possession of the guardian, and that the ward was *non compos*, and had always, after she became of age, and until the time of her decease, resided in the family of the guardian, who had married the ward's mother, and that no steps were taken to examine into the situation of the estate of the ward, until after the decease of her mother, which was seven years after the decease of the ward, and then an administrator was appointed upon the estate of the ward by the probate court, and the guardian then presented his claim, it was held that the lapse of time was fully explained by the circumstances in the case, and that no presumption of payment, or settlement, of the claim could arise. *Ib.*

See INFANT.

HABEAS CORPUS, *See* ESTOPPEL 1; CORPORATION 2.

HIGHWAYS.

1. When a new road has been laid and worked in a town, the discontinuing the old road, by the selectmen, and the leaving the new road open for travel, and thus compelling the travel to go upon the new road, are acts so unequivocal in their character, and so inconsistent with any other rational intent of the selectmen, than that the road shall be an open highway, as to be *legitimate evidence* that the road has been opened by the town and devoted to public use, so as to make the town liable for any damages arising from the insufficiency, or want of repair, of such road. *Blodgett v. Royallton*, 40.
2. And it makes no difference that the fences across the new road were first torn down, and the road thus opened, by some other person, if the selectmen, after learning the fact, and after shutting up the old road, suffer the travel to go upon such new road, without providing any other place to travel. *Ib.*

HUSBAND AND WIFE.

1. If the husband appoint an attorney to receive the money upon his wife's *chose in action*, and the attorney actually receive the money, the wife cannot join with the husband in a suit to recover the money from the attorney, but the husband must sue alone. *Hill et ux. v. Royce*, 190.
2. A married woman may dispose of her estate by will, by the consent of her husband, given in writing under his hand and seal during the coverture. *Fisher, Ex'r, v. Kimball et al.*, 323.
3. And *quære*, whether, in this State, any contract, or consent, by the husband is necessary, in order to render such will valid. *REDFIELD, J. Ib.*
4. If the husband and wife are both parties to an action on book account, the wife is a competent witness on the trial before the auditor. *Andrus et ux. v. Foster*, 556.
5. The rents, which accrue from the wife's real estate during coverture, are the absolute property of the husband, and, in case of his decease, do not survive to the wife, but are assets in the hands of the husband's administrator, and must be collected by him. *Shaw, Adm'r, v. Partridge*, 626.
6. If the lessor's interest in an estate, demised by perpetual lease, be assigned to an administrator of an intestate, and the probate court decree the same, as part of the intestate's estate, to the widow of the intestate, it will become her property; and, the covenant to pay rent running with the land, she, or her husband, if she subsequently marry, may maintain an action upon that covenant against the lessee. *Ib.*

ILLEGAL CONTRACT, *See* CONTRACT.

IMPEDING OFFICER, *See* CRIMINAL LAW.

INDEBITATUS ASSUMPSIT, *See* ASSUMPSIT.

INDEMNIFYING CONTRACT, *See* CONTRACT 14.

INDICTMENT, *See* CRIMINAL LAW.

INFANT.

1. Under the statute of this State, relative to trustee process, a minor may be charged as trustee for any indebtedness to the principal debtor for *necessaries*, or for any specific goods and chattels of the principal debtor in his hands. *BENNETT, J. Wilder et al. v. Eldrige & Tr.*, 226.
2. But it is as necessary that a minor should defend by guardian in a trustee process, as in any other case, and his guardian, if he have one, must be cited in; and if this is not done, the plaintiff must, at his peril, apply to the court to appoint a guardian *ad litem*. *Ib.*
3. But if the trustee, though a minor at the time of the service of the trustee process, become of age before disclosure is made, it is not then necessary to appoint a guardian *ad litem*. *Ib.*

4. But where a minor, previous to the service of the trustee process upon him, had purchased of the principal debtor a horse, and given his note therefor, but under an agreement, that, if the horse proved unsound, he might return the horse and receive back the note, and, after the service of the trustee process, and before he became of age, he did rescind the contract and deliver the horse to the principal debtor, and after he became of age he made his disclosure, setting forth these facts, and no guardian had ever appeared for him, or been appointed by the court, it was held that he could not be held chargeable as trustee. *Ib.*

See PARENT & CHILD.

INJUNCTION, *See* CHANCERY.

INSANITY.

1. That the defendant, in an action for a *tort*, was insane, at the time of committing the injury, is no defence to the action; and, if the action be for destroying property entrusted to the defendant, it is no defence that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. *Morse v. Crawford*, 499.
2. Where it appeared that a mortgagor, at the time he executed the note and mortgage, comprehended well what he was doing and the consequences of his acts, the court of chancery held the mortgage valid, although it appeared quite probable that there had been times, previous to the execution of the mortgage, when he might not have had sufficient capacity,—the disease under which he suffered, and of which he ultimately died, being one of the brain, and one which would not, from its nature, be at all times uniform in its influence upon the understanding. *Dary v. Seely et al.*, 542.

INSOLVENT ESTATE, *See* PROBATE COURT.

INSURANCE, *See* VERMONT MUTUAL FIRE INSURANCE CO.

INTEREST, *See* JURISDICTION 6.

JUDGMENT.

1. A judgment rendered against a defendant, omitting his christian name, cannot be considered as void; but an action may be maintained against him on such judgment, averring his identity. *Newcomb et al. v. Peck et al.*, 302.
2. The plea of *nil debet*, to an action of debt upon a judgment rendered by a court of record in another state, is bad upon general demurrer. *Ib.*
3. No plea is, in such action, admissible, which contradicts the record;—but the defendant's only remedy is to apply to the court, where the judgment was rendered, to vacate the judgment. *Ib.*
4. Therefore, where the record set forth that the defendant appeared in the original suit, in which the judgment was rendered, it was held that he was estopped by the record, in an action founded upon it in this state, from plead-

ing that he did not appear in that suit, or that an appearance, which was in fact entered for him, was unauthorised by him and without his knowledge. *Id.*

5. And, the record having been set forth by the defendant upon *oyer*, the plaintiff was allowed to take advantage of this estoppel upon general demurrer to the defendant's pleas. *Id.*
 6. In *Pierson v. Budget*, Addison Co., 1831, it was determined that a judgment rendered in another state, against a citizen of this state, who was not within the jurisdiction of the court rendering the judgment, and who had no notice of the suit, and did not appear, could not be enforced in this state by an action of debt upon the judgment. WILLIAMS, CH. J. *Id.*
- See APPEAL 1; BETTERMENTS 3; BOOK ACCOUNT 9; CONTRACT 14-15; JURISDICTION 6, 7; LANDLORD & TENANT 2; PLEADING 15-18.

JURISDICTION.

1. The doctrine of the case of *Ladd v. Hill*, 4 Vt. 164, in reference to the right of the county court to dismiss a suit for want of jurisdiction, re-affirmed. *Mamcell, Adm'r, v. Briggs*, 176.
2. Where items were charged in an account, which were not legitimate and proper subjects of a charge on book, and were stricken out before the commencement of the action upon the account,—which was brought before a justice of the peace,—it was held that the jurisdiction of the justice was not thereby affected. *Sheldon v. Flynn*, 233.
3. And if the defendant's account contain charges which accrued in payment of the items thus stricken from the plaintiff's account, it will be proper for the auditor to deduct such items from the amount of the defendant's charges of that character, and apply the balance, together with the remainder of the defendant's account, in offset to the plaintiff's account;—and the appellate jurisdiction of the county court will not be affected by the plaintiff's claiming that such deduction should be made. *Id.*
4. In a case admitting of reasonable doubt as to the amount in dispute exceeding one hundred dollars, and where the plaintiff might have had reasonable ground of expectation of recovering more than that sum, the action will not be dismissed for want of original jurisdiction in the county court. *Henry v. Tison*, 479.
5. The courts of this state have jurisdiction of questions as to the effect of a discharge in bankruptcy, obtained from the district court of the United States under the Act of Congress of Aug. 19, 1841, upon judgments and contracts which might have been proved under the commission. *Comstock v. Groat*, 512.
6. Where a judgment has been rendered for a sum less than \$100, but, with the interest due upon it, would exceed \$100, the judgment creditor may waive his claim for interest and sustain an action before a justice of the peace for the amount of the judgment alone. *Parkhurst v. Spalding*, 527.
7. Where, in such case, the declaration before the justice of the peace de-

scribed the judgment correctly, and concluded, generally, "to the damage of the plaintiff, as he says, one hundred dollars," and in the county court the plaintiff filed a new declaration, claiming to recover the *debt* only, and making no claim for *damages*, it was held that the action should not be dismissed for want of jurisdiction in the justice before whom it was originally commenced. *Ib.*

8. A bill of goods sold, and paid for at the time of delivery and receipted, cannot be reckoned as any part of the plaintiff's account, in determining the question of jurisdiction of an action of book account. *Nelson v. Emery*, 579.
9. Where, in a receipt for property attached upon *meine process*, the receptor promises to safely keep the property, and deliver it to the officer holding the execution which may be obtained in the suit, or "pay all cost and damage, in case of failure," and the judgment finally recovered by the plaintiff in the suit, together with the cost and officer's fees, for which the receptor is liable, amount to a sum less than \$100, the county court have not jurisdiction of an action upon the receipt, notwithstanding the value of the property attached, as expressed in the receipt, may exceed \$100.00. *Maxfield v. Scott*, 634.
10. If the county court have not original jurisdiction of an action commenced in that court, yet, if the parties mutually agree to a reference of the action, under an order of court, and it is referred, the objection on account of the want of jurisdiction is thereby waived. *Ib.*
11. If the plaintiff sets forth, in declaration, a claim exceeding \$100, and introduces testimony tending to establish it, and it appears that the action was brought in good faith, the plaintiff supposing that a right to recover the claim existed, the county court will not be deprived of original jurisdiction of the case, though it may eventually appear that the plaintiff misjudged as to his right; and it will make no difference, whether the plaintiff's misapprehension of his rights consisted in a mistaken *valuation* of property, or in a mistaken notion of the law, that was to govern and determine his claim. *Brainard v. Austin*, 650.

See PROCESS 2.

JURY, *See* AUDITA QUERELA 5.

JUSTICE OF THE PEACE, *See* JURISDICTION 6; TENDER 1.

LANDLORD AND TENANT.

1. Where to a clause for re-entry, in a lease, for non-payment of rent, there is attached a condition that the landlord shall, before entering, give to the tenant in arrear thirty days notice, the landlord has no right to re-enter, unless he give such notice. The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reserved by deed, and all the conditions, or stipulations, annexed thereto must be strictly followed. *Smith v. Blaisdell et al.*, 199.
2. Where, in such case, the tenant conveys his interest in the premises to a third person, but still retains the possession, a judgment obtained against him by the landlord in an action of ejectment for non-payment of rent, ob-

- tained without giving any notice to the grantee of the tenant, can have no effect, as against such grantee; nor will any subsequent lease, or deed, executed by the landlord, convey any legal title as against him. *Ib.*
3. But where the grantee of the tenant, in such case, permitted the tenant to retain the possession of the premises, and the tenant, by means of such possession, obtained a credit with the defendant, and procured the lessor to convey the premises to the defendant by perpetual lease, and the defendant executed to the tenant a bond, conditioned for the conveyance of his title to the tenant on payment of a certain sum by a day named, and the tenant, failing to make payment by the day named in the bond, surrendered the possession of the premises to the defendant, who entered, and retained the possession, claiming an absolute right thereto by virtue of the lease to him from the landlord, and the orator, who was assignee of the tenant's bond, and who had also purchased the title of the tenant's grantee, brought his bill to assert his right within six years from the time the defendant took possession of the premises, the court held that his right was not affected by the lapse of time, but that they would not allow him to redeem, without payment to the defendant of the sum originally advanced to the tenant by the defendant upon the credit of the premises, as specified in the condition of the bond; and the court refused to compel the defendant to account for the rents and profits during the time he had been in possession, and also refused to allow him interest upon his money during that time. *Ib.*
 4. And this relief was granted to the orator, notwithstanding the deed from the tenant's grantee to the orator was executed at a time when the defendant was in adverse possession of the premises, claiming title thereto by virtue of his lease. *Ib.*
 5. In an action for use and occupation, the defendant cannot dispute the title of his landlord, nor that of the assignee of his landlord; and he is bound to pay rent, while he occupies, to the plaintiff, though the assignment from the landlord, under which the plaintiff claims, were fraudulent and void as to the creditors of the landlord. *Stem et al. v. Wardsworth*, 297.
 6. Where, in an action of covenant for rent, brought against the assignee of the lessee, the plaintiff alleged that all the estate, right, interest, &c., of the lessee in the demised premises came to and vested in the defendant, by assignment thereof, and that the defendant entered into possession of said premises after said assignment, and retained the possession thereof until the rent sued for became due, and the defendant pleaded that the estate, right, &c., of the lessee did not come to and vest in him, as alleged in the declaration, and that he was not possessed of and in the said demised premises in manner and form as the plaintiff had alleged, upon which plea issue was joined, it was held that the fact of the assignment was the only material part of the issue, and the only part which the plaintiff was required to prove, and that the defendant could not be allowed to prove that he did not in fact take possession of said premises after the assignment. *Pingry v. Watkins*, 379.
 7. If the lessee have covenanted, by the terms of the lease, to pay rent to the lessor, he does not become discharged from this liability by assigning the

leasehold premises to a third person; but, in case the rent is not paid by the assignee, as it becomes due, an action of covenant may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor may have received rent from the assignee, and accepted him as tenant of the premises. But, *Per HUBBARD, J.*, it would be different, if the action were debt, instead of covenant broken. *Shaw, Admr, v. Purtridge*, 626.

8. A lessor by perpetual lease, reserving rent, has an assignable interest in the estate; and if he assign his interest to one as administrator of the estate of a deceased person, such administrator will hold that interest, as assets of the estate, in the same manner and for the same purpose that he holds the other property of the estate, and subject to the same order of the probate court. *Ib.*
9. And if, the lessor's interest in the estate being thus assigned to an administrator of an intestate, the probate court decree the same, as part of the intestate's estate, to the widow of the intestate, it will become her property; and, the covenant to pay rent running with the land, she, or her husband, if she subsequently marry, may maintain an action upon that covenant against the lessee. *Ib.*
10. And in such case there is no variance, though the declaration describe a personal covenant by the lessee, and the lease offered in evidence show a covenant running with the land. *Ib.*

LEGACY, *See* DEVISE.

LICENSE.

1. Where a town voted to hold their town meetings at the house of the plaintiff, who was one of the inhabitants of the town, and, at the town meeting at which the vote was taken, it was publicly stated, in the hearing of the plaintiff, that he would ask nothing for the use of his house, only that the selectmen should grant him a license to sell liquor, on town meeting days, at his house, and the plaintiff made no objection, at the time this statement was made, it was held that proof of this, coupled with evidence that the plaintiff did afterwards usually take a license to sell liquor at his house on town meeting days, would justify the conclusion that the plaintiff so understood the terms upon which the meetings were to be held at his house, and that he had, therefore, no right to claim payment from the town for the use of his house, unless he had subsequently revoked the license, and given the town notice that he should claim pay. *Orcutt v. Roxbury*, 524.
2. But notice, merely, that he could not any longer have the meetings held at his house without proof that he also gave notice that he should, after that, claim pay, and without proof of any express promise on the part of the town to pay, was held insufficient to entitle him to recover for such use. *Ib.*

See FIXTURES 4.

LIMITATIONS.

1. A disability, to save the operation of the statute of limitations in regard to real estate, must exist in the heir *at the time* the right, or title, first descends to him. Hence *successive* disabilities, though existing in the same person, cannot exempt his right from the operation of the statute. *McFarland, Adm'r, v. Stone*, 165.
2. The doctrine of presumptive grants cannot be applied to a case which is within either the enacting or saving clause of the statute of limitations; it applies only to cases which are not strictly within the statute. *Ib.*
3. In case of tenancy in common of real estate, the right of part of the tenants to recover in ejectment is not affected by the fact that the rights of their cotenants are barred by the operation of the statute of limitations. *Ib.*
4. Any entry upon land, which puts in operation the statute of limitations against him whose right is superior, creates an *ouster*. *Ib.*
5. *It seems*, that in ejectment, where the defence is adverse possession founded on claim of title, the statute of limitations will bar all claim for the recovery of the rents and profits which accrued more than six years prior to the commencement of the plaintiff's action. *Ib.*
6. The statute of limitations is not applicable to the account of a guardian against his ward, while the relation subsists; and, after its termination, lapse of time will not bar the guardian's claim, when the delay is sufficiently explained by the circumstances of the case. *Kimball v. Ives, Adm'r*, 430.
7. The question, whether a claim shall be considered as barred by mere lapse of time, is one of fact, which must be determined by the jury, and, if not litigated before the jury, cannot be raised, as a question of law, before the court. *Ib.*

See ACTIONS PENAL 1-3; GUARDIAN 2.

MESNE PROFITS, See EJECTMENT.

MISNOMER.

1. If a person, who is known equally by the name of Barnabas and Barney, enter into a recognizance by one name, and be sued by the other, the variance will not be considered fatal,—the one being but an abbreviation of the other. *McGregor v. Balch et al.*, 562.

MISTAKE, See CHANCERY 11, 21, 22.

MORTGAGE.

1. When notes are secured by mortgage on land, and the mortgagor dies before payment, it is not necessary that the notes should be presented to the commissioners upon the mortgagor's estate for allowance, in order to keep the mortgage security good;—but if they are presented and allowed, the mortgage security is not thereby affected. *Putnam et al. v. Russell et al., Adm'rs*, 54.
2. When a person has a mortgage upon land, and another person has a subsequent mortgage, if the second mortgagee stand by and see the mortgagor

induce the first mortgagee to release his mortgage and take the assignment of another security, which he supposes to be next to his own, but which is in fact subsequent to the second mortgage, such subsequent security will be preferred to the second mortgage. *Stafford v. Ballou et al.*, 329.

See CHANCERY 26; EJECTMENT 10; EVIDENCE 22; PAYMENT 1.

MOTION TO DISMISS, See PARENT & CHILD 9, 10.

NEW TRIAL.

1. The fact, that a witness was rejected on the trial of a case, as being incompetent through interest, is not a sufficient reason for granting a new trial, as for a surprise. *Haskins v. Smith et al.*, 263.
2. So, where the party, on trial proved the execution of a promissory note, and the indorsements upon it, as collateral evidence in the case, and laid the note upon the table without reading it to the jury, or giving notice to the court that it was put into the case, it was held no ground for granting a new trial, for a surprise, that the court, after the argument had commenced, refused to allow the party to comment upon or use the note as evidence in the case. *Ib.*

NOTICE, See CHANCERY 19; CONTRACT 13.

OFFICER, See FRES, SHERIFF.

ORDER OF REMOVAL, See POOR.

PARENT AND CHILD.

1. One who trades with an infant, and gives credit to him alone, knowing all the facts in the case, can never, after that, sustain an action against the father of the infant for the articles thus delivered. *Gordon v. Potter*, 348.
2. A parent is not liable for necessities furnished to his minor child, unless they are furnished by his authority, express, or implied. *Ib.*
3. Where the defendant permitted his minor son to go out to work by the month, and the plaintiff delivered to the son certain cloth and trimmings, for articles of necessary clothing, knowing the circumstances, and it did not appear that the father ever expressly authorized the delivery of the articles to the son, it was held that the plaintiff could not recover for them of the father, notwithstanding it appeared that the father knew that the son had purchased the articles, and that he gave the son money to help make up the cloth, and permitted him to wear out the clothes, when made. *Ib.*
4. Where a daughter continues to reside in the family of her father after the age of majority, the same as before, the law implies no obligation on the part of the father to pay for her services. *Andrus et ux. v. Foster*, 558.
5. And the same rule applies to cases where the person, from whom the compensation for services is claimed, took the plaintiff into his family, when she was a child, to live with him until she should become of age, and she continues, after that time, to reside in his family, he standing in *loco parentis* to her. *Ib.*

6. If she claim pay, it is incumbent upon her to show that the services were performed under such circumstances, as to justify an expectation on the part of both that pecuniary compensation would be required. *Ib.*
7. The right to compensation for services, in such cases, must depend upon the circumstances of each particular case. *Ib.*
8. In this case the plaintiff, being the niece of the defendant, and taken by him, when she was a child, to live with him until she should become of age, was told by him, when she arrived of age, that she was free to go, if she chose, but that, "if she remained and did well, he would do well by her," and she thereupon continued to reside with him for about six years, as a member of the family, and was uniformly treated as she was before she became of age, neither party keeping any accounts. The plaintiff then left the defendant and went to New Hampshire, and continued to reside there, without any expectation of returning, for about five years, when, at the request of the defendant, she returned and worked for him, and in his family, for about a year. And it was held that she was not entitled to recover compensation for her services during the time, which elapsed after she became of age, and before she went to New Hampshire,—but that she was entitled to pay for her services rendered for the defendant after she returned from New Hampshire. *Ib.*
9. Where the son of a pauper was summoned to appear in the county court and show cause why he should not contribute to the support of the pauper, and he appeared and suggested that there was another son, of sufficient ability, and the latter was thereupon summoned also into court to answer to the original petition, and he appeared, and, at the third term after the citation was served upon him, filed a motion to dismiss the petition, as to himself, assigning, as cause, that the pauper had deceased before the service of the citation upon him, it was held that his motion was out of time, and that it should have been filed at the first term after the return of the citation. *Tinnmouth v. Warren et al.*, 606.
10. But it was also held, that, inasmuch as the pauper was alive at the time service was made of the original petition and citation, and also at the time the citation issued to summon in the second brother, the motion should have been overruled, though filed in season,—as the statute, in such cases, makes the kindred liable for past, as well as future support. *Ib.*
11. *Quare*, Whether the proceedings of the county court upon such a petition can be revised upon exceptions. *Ib.*

See POOR 1-3.

PARTIES, See ACTION; ACTIONS PENAL 8; EJECTMENT; PLEADING 3-5, 21-23.

PARTNERSHIP.

1. The individual members of a copartnership, who have advanced money for the benefit of the firm, are, in an action of account brought to liquidate the concerns of the firm, entitled to interest on such advances from the time they were made. *Hodges et al. v. Parker et al.*, 242.

2. One of two partners has not authority to assign all the partnership property to a trustee, for the benefit of the creditors of the firm, and thus put an end to the entire business of the firm. *REDFIELD, J., and BENNETT, J. Dana, Adm'r, v. Lull*, 390.
3. A person, who suffers himself to be held out to the world as a partner in a firm, will be liable for all debts which the firm contract upon the joint credit of themselves and him; and this is especially true, when he represents himself as a partner in the firm, and that to the very persons who seek to charge him, and who gave credit to the firm mainly upon his responsibility. *Hicks et al. v. Cram et al.*, 449.
4. Where, in an action against two, charging them as partners, evidence has been given to prove that one, who denies his liability as partner, had so held himself out as partner, as to enable the other defendant to pledge their joint credit, if he chose, evidence is admissible to prove that the latter, in the absence of the former, represented the former to be his partner, to the plaintiffs, as tending to prove that the plaintiffs relied upon the joint credit of the two, and to rebut evidence, previously introduced by the defendants, tending to prove that the plaintiffs relied upon the credit of one of the defendants and of a third person. *Ib.*
5. Hearsay, or common reputation, or the belief of the witness founded upon such a basis, is not competent evidence to prove that certain persons were partners. *Ib.*
6. When a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit on the part of the defendants; and an appearance in the suit, entered by the attorney thus employed, will be binding and conclusive upon the other partners. *Bennett et al. v. Stickney*, 531.

See BOOK ACCOUNT 1, 4, 19.

PAUPER, *See* POOR.

PAYMENT.

1. Where D. was indebted to A., for which he executed certain promissory notes, and secured them by mortgage upon land, and afterwards executed to him other notes, which were not secured, and, before payment of any of the notes, D. deceased, insolvent, it was held that, if A., after the execution of the notes, became indebted to D., and no application thereof was made in the lifetime of D., his administrators could not direct the application to be made upon the notes secured by mortgage, but that the law would first make the application upon the notes not secured. *Putnam et al. v. Russell et al., Adm'rs*, 54.
2. There is a material distinction between a *payment*, technically as such, and a *claim* which needs to be filed in offset. *Ib.*

See CONTRACT 8; BOOK ACCOUNT 19.

PENAL ACTIONS, *See* ACTIONS PENAL.

PLEADING.

1. The pendency of another appropriate and prior action for the same cause, though it may be in a different court, is a proper and sufficient matter to be pleaded in abatement of the second suit; but it is essential that both suits be in favor of the same plaintiff. *Thomas v. Fredon*, 138.
2. Therefore where, to an action brought by the indorsee of a promissory note, the defendant pleaded in abatement the pendency of a prior action against him upon the same note, brought by the payee of the note, in his own name, while he was the owner of the note, and before any indorsement of it had been made, it was held that the plea was insufficient. *Ib.*
3. If one obligor be sued alone upon a joint bond, and it appear from the declaration that the other obligor is still living, the declaration is bad upon demurrer; but if it do not appear from the declaration that the other obligor is still living, the non-joinder can only be taken advantage of by plea in abatement. *BENNETT, J. Needham et al. v. Heath*, 223.
4. But in actions upon recognizances, judgments, and other matters of record, if it appear from the declaration that there is another joint debtor, who is not sued, the non-joinder may be taken advantage of by demurrer, although it is not shown that the other debtor is still living. *Ib.*
5. In debt upon a recognizance for the prosecution of an appeal from the judgment of a justice of the peace, it must appear from the declaration, that the recognizance was entered into before the justice who rendered the judgment appealed from, or the declaration will be bad upon demurrer. *Ib.*
6. A declaration, counting upon a sale made by the plaintiff to the defendant, and a promise thereupon made by the defendant to the plaintiff, is not sustained by proof of a sale made by a third person, and a promise by the defendant to such third person, for the benefit of the plaintiff. Where a promise is made to a third person for the benefit of the plaintiff, the declaration must state it to have been made according to the fact. *Hall v. Hamtoon*, 244.
7. The plea of *nil debet*, to an action of debt upon a judgment rendered by a court of record in another state, is bad upon general demurrer. *Newcomb et al. v. Peck et al.*, 302.
8. No plea is, in such action, admissible, which contradicts the record;—but the defendant's only remedy is to apply to the court, where the judgment was rendered, to vacate the judgment. *Ib.*
9. Therefore, where the record set forth that the defendant appeared in the original suit, in which the judgment was rendered, it was held that he was estopped by the record, in an action founded upon it in this state, from pleading that he did not appear in that suit, or that an appearance, which was in fact entered for him, was unauthorised by him and without his knowledge. *Ib.*
10. And, the record having been set forth by the defendant upon *oyer*, the plaintiff was allowed to take advantage of this estoppel upon general demurrer to the defendant's pleas. *Ib.*
11. Defects in form, merely, in a plea will not be reached by general demurrer. *Churchill et al. v. Boyden, Adm'r*, 319.

12. When there is a plea of *nil tid record* in a case, the issue upon it can only be tried by the court; and if there is also an issue to the jury in the case, the issue to the court should be first tried. *Gray v. Piggy*, 419.
13. The greatest strictness is required in pleading estoppels. Every fact, necessary to create the estoppel, must be alleged with the strictest certainty, and it must be alleged that all these facts appear by the record, which is vouched as an estoppel, and the plea should conclude by relying upon the estoppel. But if the matter of estoppel is pleaded merely as a plea in bar, and the plea is not demurred to, the court will consider it as sufficiently pleaded. *Ib.*
14. The form of pleading an estoppel in *Shelley v. Wright*, Willes 9, approved. *Ib.*
15. When a former adjudication is relied upon as having determined the entire merits of the controversy now in hand, it need not be pleaded as an estoppel, but is an equitable defence, and, in many actions, may be given in evidence under the general issue, and, when required to be pleaded in bar, is not required to be pleaded with greater strictness than any other plea in bar. REDFIELD, J. *Ib.*
16. But when the former trial is relied upon as settling some collateral fact, involved in the present controversy, it must, to be conclusive, be pleaded strictly as an estoppel, and the record vouched in support of the plea must contain, upon its face, evidence that the particular fact was in issue, and was found by the triers. REDFIELD, J. *Ib.*
17. And if such fact do not appear, by the record, to have been distinctly put in issue, and it becomes necessary to resort to oral evidence to show that it was involved in that controversy, the matter cannot be pleaded as an estoppel, but it becomes a subject for the jury to pass upon;—but, if it is proved that the fact was decided in the former controversy, that decision is binding upon the parties, and, of course, upon the jury. REDFIELD, J. *Ib.*
18. But if the former recovery, relied upon as a defence by plea in bar, was in reference to the same subject matter, now involved, was between the same parties, and the fact relied upon now was then put distinctly in issue, and was found by the triers, and this appears by the record, and no exception is taken to the form of pleading the estoppel, the estoppel is conclusive, notwithstanding there may be some formal differences between the present and former action. *Ib.*
19. The difference between a title defectively stated and a defective title illustrated. *Lincoln v. Blanchard*, 464.
20. A general appearance, entered by the defendant in a suit upon the docket of the court, and submitting to the jurisdiction of the court, by pleading to the merits of the suit, is a waiver of any defect of service, which might have been taken advantage of by pleading. *Bennett et al. v. Stickney*, 531.
21. The omission of one or more joint obligors, in actions *ex contractu*, can only be taken advantage of by plea in abatement, unless the fact that such parties were joint contractors appear of record in the very suit on trial,—in which case the omission may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error. *McGregor v. Balch et al.*, 562.

22. The rule is the same in regard to the omission of a joint contractor in suits founded upon record contracts,—such as recognizances,—unless the defendants crave oyer of the record and have it spread upon the record of the pending suit. If that be done, the defect, appearing upon the face of the pleadings, may be taken advantage of by demurrer, &c. *Ib.*
23. *Quere*, Whether, if seven years from the time of entering into the contract have not elapsed, it will not be presumed that the omitted obligors are living? *Ib.*
24. Upon a general demurrer to a plea, which is defective in substance, judgment will, nevertheless, be rendered, that the plea is sufficient, if the declaration is fatally defective in substance. *Probate Court v. Saxton*, 623.
25. When a declaration counts directly upon an instrument in writing, and does not profess to recite it, it is sufficient to declare according to the legal effect of the instrument. *Maxfield v. Scott*, 634.
- See* ACCOUNT; ACTION 4; ACTION ON THE CASE 4-6; ACTIONS PENAL 4; AGENT 7; BANKRUPTCY 5; CONTRACT 17; EX'RS & ADM'RS 7; MISNOMER 1; RECOGNIZANCE 11; VARIANCE 1, 2.

POOR.

1. Where a minor, being a transient person, was taken sick in a town in which he had no legal settlement, and the town in which his father had a legal settlement,—which was also the place of legal settlement of the son,—voluntarily paid to the former town the money expended for the minor's support, it was held that an action would not lie therefor in favor of the latter town against the father, though he were of sufficient ability to support his son. *Bloomfield v. French*, 79.
2. And, *Per* HEBARD, J., if a judgment had been recovered in favor of the former against the latter town, for the money thus expended, even this would not enable the latter town to maintain an action therefor against the father. *Ib.*
3. But the town expending the money might unquestionably have recovered it of the father, by an action brought directly against him. HEBARD, J. *Ib.*
4. The decision in *Strafford v. Hartland*, 2 Vt. 565, has the same force and authority under the Revised Statutes, that it possessed under the statutes under which the decision was made. *Braintree v. Westford*, 141.
5. Under the Revised Statutes the appeal from an order of removal of a pauper must be taken to the term of the county court next succeeding the time when notice of the order is given to the defendant town, as required by the statute; and if not so taken, the settlement of the pauper becomes conclusively fixed by the order. *Ib.*
6. An appeal from a warrant of removal of a pauper cannot be allowed, when the order, upon which the warrant issued, has been acquiesced in, by neglecting to enter an appeal from it at the term required by statute, and it has thus become no longer open to litigation. *Ib.*
7. An individual cannot sustain an action against a town, for support afforded

- to a pauper having a legal settlement in such town, when there is no evidence that the support was afforded at the express request of the town, and there has been no subsequent promise to pay. *Churchill v. West Fairlee*, 447.
8. All that is required, in order to change a legal settlement by seven years' residence, is, that the person should have his permanent domicile in the second town for seven consecutive years, being *sui juris*, and that neither he, nor his family, if he have one, should become chargeable to either town. *Turnbridge v. Norwich*, 493.
 9. But it is not necessary that he should have a family, or, if he have one, that they should be maintained by him, or reside with him, provided they do not become a public charge. In this case the pauper's wife and family resided in another state, during the whole of the seven years, and it was held that the change of residence was not thereby affected, and that the new settlement gained by the husband became the place of the wife's legal settlement, although the husband had deserted her, in such other state, more than twenty years prior to the making of the order of removal, and they had never, from that time, lived together as husband and wife. *Ib.*
 10. The burden of proof is upon the town, causing a warning out process, under the statute of 1801, to be served upon a pauper residing within its limits, to prove that the warning was recorded, as required by law, within one year from the time the pauper commenced his residence in the town. *Poulet v. Sandgate*, 619.
 11. And the court will not presume that the warning was recorded within the year, from the fact that a copy is produced, on trial, which is certified by the town clerk to be "a true copy of record," and which has upon it a copy of a certificate, made upon the original, at the time it was returned to the town clerk's office, signed by the town clerk then in office, and certifying that the warning was "received into record," and bearing date at a time within the year. *Ib.*

POSSESSION, *See* EJECTMENT; SALE.

PRACTICE.

1. Every proper intendment is to be made, to sustain a verdict; and it is the duty of the excepting party to show affirmatively that error intervened on the trial. *Elkins v. Parkhurst*, 105.
2. Where a motion to dismiss a suit, for want of any recognizance being taken, is filed in the county court, that court must take notice of whatever is shown by the writ itself; but if that court dismiss the suit, and the writ is not referred to in the bill of exceptions, this court will consider the question, whether there was any minute of recognizance upon the writ, one of fact, and as decided by the county court. *Sisco v. Hurlburt*, 118.
3. When, after an amendment has been permitted in the county court, the action has progressed to trial and judgment, it must appear beyond a doubt that the amendment was permitted contrary to law, to justify the supreme court in setting aside the subsequent proceedings for that cause. *Waterman v. Hall et al.*, 128.

4. It is discretionary with the Supreme Court, after they have adjudged an indictment sufficient upon demurrer, to allow the respondent to plead anew, and remand the case to the county court for trial, or not. *State v. Williams*, 151.
5. It is error to charge the jury that they may find a fact, when there is no legal testimony tending to prove such fact. *Mansell, Adm'r, v. Briggs*, 176.
6. Where exceptions are taken to the decision of the county court in discharging a trustee, and the supreme court affirm that judgment, they will also, *pro forma*, affirm the judgment against the principal debtor, without costs. *Wilder et al. v. Eldridge & Tr.*, 226.
7. What constitutes a concurrent possession is a question of law, to be determined by the court; but the jury must decide what facts, tending to show such possession, are established by the evidence. *Hall v. Parsons*, 271.
8. When the testimony offered and admitted in the court below was objected to, and the question presented upon the bill of exceptions is, whether the testimony tended to support the declaration, the supreme court will not examine into the sufficiency of the declaration, but will affirm the judgment, if the testimony was pertinent to the issue. *Onion v. Fullerton*, 359.
9. Questions once decided in a case in the Supreme Court are not open for argument, when the same case is again before the court at a subsequent term. *Pingry v. Watkins*, 379.
10. When there is a plea of *nil tiel record* in a case, the issue upon it can only be tried by the court; and if there is also an issue to the jury in the case, the issue to the court should be first tried. *Gray v. Pingry*, 419.
11. The question, whether a claim shall be considered as barred by mere lapse of time, is one of fact, which must be determined by the jury, and, if not litigated before the jury, cannot be raised, as a question of law, before the court. *Kimball v. Ives, Adm'r*, 430.
12. When, in an action on contract, the testimony is all on paper, and is before the court, it becomes the duty of the court to instruct the jury, as a question of law, whether the testimony, all being true, proves the contract alleged,—and, if the contract is not proved, as alleged, to direct the jury to return a verdict for the defendant. *Mizer et al. v. Williams*, 457.
13. When it appears from the whole case, as stated in the bill of exceptions, that the plaintiff is entitled to recover, the case will not be remanded, for a new trial, though evidence, offered by the defendant in the court below, may have been rejected improperly under the view there taken of the case by the parties and the court. *Morse v. Crawford*, 499.
14. The supreme court will not reverse a judgment *pro forma*, and remand the case to the county court, in order to enable the plaintiff to move to amend his declaration,—especially when the plaintiff had once declined taking such a course, when, in the course of the trial in the court below, it was suggested by the court as being necessary to a recovery. *Denison v. Tyson*, 549.

See BANKRUPTCY 6; REVIEW 2; SLANDER 1.

PRESUMPTION.

1. A presumption cannot be based upon a presumption. *Adm'r of Hammond v. Smith*, 231.

See AGENT 3; CONTRACT 17; PLEADING 23; POOR 11.

PRINCIPAL AND AGENT, *See* AGENT.

PRINCIPAL AND SURETY, *See* BANKRUPTCY 1, 2; CHANCERY 23.

PROBATE COURT.

1. When an ancillary administration is granted in this state upon the estate of one who was a resident of another state, creditors residing in such other state are not entitled to have their claims allowed by the commissioners appointed here. *Churchill et al. v. Boyden, Adm'r*, 319.
2. If the funds found here are more than sufficient to pay the creditors residing here, the court will not ordinarily make any decree of distribution among heirs, or legatees, but will remit the balance to the principal administration;—but this is a matter resting in their discretion. *REDFIELD, J. Ib.*
3. If the estate is solvent, the resident creditors will be entitled to full payment of their claims here; but if insolvent, then the prevailing practice is to pay the resident creditors *pro rata*, taking into the account all the creditors and the whole estate, so far as can be ascertained. *Per Ib. Ib.*
4. But in the state where the principal administration is, the entire mass of the creditors are entitled to have their claims allowed, and to share ratably in the assets, until fully paid. *Per Ib. Ib.*

See EVIDENCE 17; EX'RS & ADM'RS 2.

PROCESS.

1. If a writ, returnable before a justice of the peace, is put into the hands of an officer for service more than sixty days before the return day therein named, it is his duty, under the statute, to omit making any service thereof until within sixty days before the return day. *Nelson v. Denison*, 73.
2. In an action of trespass on the freehold, brought before a justice of the peace, the writ must be made returnable in the town where one of the parties resides, if both parties are citizens of this State; and the writ will abate, if made returnable in the town where the land lies, if neither of the parties, resides in that town. In this respect section 16 of chapter 28 of the Revised Statutes, respecting process, does not control section 14 of chapter 28, which specifies where writs, in actions before a justice of the peace, shall be made returnable. *Jones et ux. v. Conant*, 656.

See EXECUTION 3, 4.

PROMISSORY NOTES.

1. When a note is payable in specific articles on a day certain, no demand is necessary before bringing the suit;—otherwise, *Per BENNETT, J.*, if payable on demand. *Elkins v. Parkhurst*, 105.

2. If, upon a note payable in leather on a given day, the defendant turn out leather unsealed, which, by law, is required to be sealed before it is offered for sale, or if he turn out leather which has been sealed as bad leather, such tender cannot avail the defendant as a bar to an action on the note. *Ib.*
3. If a note be made payable in leather, without any designation of the quality, the holder has a right to require that it shall be of *merchantable* quality. *Ib.*
4. A contract between A., the owner of a note, and B., that B. may take the note, and collect it at his own expense, and have one half of what he collects, vests no interest in the note in B., nor does it preclude A. from collecting the note, if he has an opportunity. *Mamwell, Adm'r, v. Briggs*, 176.
5. The case of *Sanford v. Norton*, 14 Vt. 228, so far as it decides in reference to the liability of one, not party to a note, who indorses it in blank, commented upon and examined by WILLIAMS, Ch. J. *Sanford v. Norton*, 285.
6. Where, at the time a note was indorsed, the maker of the note was engaged in business in this state, and lived in a house with his son and daughter, his daughter being his housekeeper, and, before the note became due, went into another state, leaving his son and daughter living in the same house, his son being his agent in the transaction of his business in this state, it was held that a demand of payment of the note, made, on the day it became due,—which was about nine months after the maker of the note left the state,—at the house previously occupied by him, and which was then occupied by the son and daughter, was sufficient to charge the indorser, it not appearing that the maker had ever abandoned the idea of returning to his said residence, although it did appear, that, at the time the demand was made, he had an actual residence in another state. *Ib.*
7. Neither the declarations of the payee of a note, as to payments made to him by the maker, nor a receipt signed by him, acknowledging such payment, made at a time when he was not holder of the note, are competent evidence for the maker of the note, in an action brought against him by an indorsee, when the payee is alive and can be produced as a witness. *Washburn et al. v. Ramsdell*, 299.
8. *It seems*, that, in the absence of all proof as to the time when a note was indorsed, the court will presume that it was indorsed while current. *Ib.*
9. A contract in the form of a promissory note, payable in specific articles, is treated, in this state, as a promissory note, both as to the form of declaring upon it, and as to the necessity of giving evidence as to the consideration, in the first instance, on the part of the plaintiff. *Denison v. Tyson*, 549.
10. A mere trustee may sustain an action as bearer of a promissory note, made payable to a person specified or bearer, for the benefit of the owner, by his consent. *Boardman v. Roger et al.*, 589.
11. And such action may be sustained by one, as bearer, by direction of the legal owner of the note, though the note may never have been delivered to the person to whom it is made payable, and though his name may have been used as payee without his consent. *Ib.*
12. An officer, who takes from the receptor of property attached a note, in

satisfaction of the receiptor's liability for having permitted the property to be wasted, in the absence of all authority from the creditor so to do, becomes himself the absolute owner of such note. *Ib.*

13. It is no defence to an action on note, that the note was secured by mortgage, and that the mortgagee has obtained a decree of foreclosure, if he have not enjoyed the premises, nor taken, nor attempted to take, possession of them. *Austin v. Howe*, 654.

See USURY 1, 2.

RECEIPTOR, *See* ACTION 7; ATTACHMENT 9, 12; EVIDENCE 9; JURISDICTION 9.

RECOGNIZANCE.

1. In an action of *scire facias* upon a recognizance for a review the plaintiff can recover, as damages, whatever he has lost by the delay occasioned by the review, together with additional cost; but when there has been no loss of principal, there can be no recovery of interest. *Roberts v. Warner*, 46.
2. Therefore where the debtors, at the time of the rendition of the judgment, from which the review was taken, were totally insolvent, and so continued until the time final judgment was rendered, it was held that interest could not be recovered, as "intervening damages," on *scire facias* against the recognizor for the review. *Ib.*
3. A writ of *audita querela* is within the statute,—Rev. St. c. 28, § 5,—which requires a recognizance to be taken to the defendant for his costs, &c.; and a sufficient minute of such recognizance must appear upon the writ. *Sisco v. Hurlburt*, 118.
4. A minute of a recognizance, in which no sum, is stated, as the forfeiture, is of no binding force, and is not a compliance with the requirement of the statute. *Ib.*
5. In debt upon a recognizance for the prosecution of an appeal from the judgment of a justice of the peace, it must appear from the declaration, that the recognizance was entered into before the justice who rendered the judgment appealed from, or the declaration will be bad upon demurrer. *Needham et al. v. Heath*, 223.
6. A justice's record of a recognizance, taken for the prosecution of an appeal; that the consors "jointly and severally recognized in the sum of one hundred dollars for the prosecution of the appeal in due form of law," is well enough, and is competent evidence under a declaration, which alleges that the condition of the recognizance was, that the appellants "should prosecute their said appeal to effect, and answer and pay all intervening damages, occasioned by delay to the said plaintiff, with additional costs, if judgment be affirmed." *McGregor v. Balch et al.*, 562.
7. In estimating "intervening damages," in such case, the property which the appellant had at the time the appeal was taken and all that he acquired during the pendency of the appeal is to be taken into the account. The plain-

tiff is entitled to recover the value of his *chance* of collecting his debt during the time of the suspension of his execution. *Ib.*

8. A recognizance, taken by a judge of the county court in vacation, for the due appearance &c. of one who has been committed by a magistrate upon a warrant issued in a case for bastardy, becomes itself, upon being returned and filed in the county court, a part of the record, and is not required to be enrolled by the clerk. *Blood v. Morrill et al.*, 593.
9. In an action upon such recognizance, in which it is averred in the declaration that the recognizance was recorded in the county court and profert is made of the record, the proper proof, on the plea of *nil tiel record*, if the suit is in the same court, is an inspection of the original recognizance. *Ib.*
10. In order to exonerate the bail, in such case, from his liability for his principal, there must have been an actual surrender of the principal into the custody of the officers of the court, and this must be evidenced by an *exoneratur* entered upon the record. It is not sufficient that the principal, at the term of the county court to which the proceedings are made returnable, enters an appearance in the action by attorney, and himself attends court, prepared for a trial. *Ib.*
11. In a declaration upon such recognizance, an averment, that the court, on default, taxed the costs in the original action at a certain sum named, is not considered as a *descriptive averment*, but only as an *avermnt of a fact*; and if, on the production of the record, it does not appear that the court taxed the costs, it is no ground for objection, upon the plea of *nil tiel record*. *Ib.*

RECORD.

1. Any fact, which should be matter of record, should be proved by the record. *Sherwin v. Bugbee*, 337.
2. An indorsement upon a paper, that it has been "received into record," is not a compliance with a law which requires it to be recorded;—the record must be made by actually transcribing the paper into a book kept for that purpose. *Puolel v. Sandgate*, 619.

See EVIDENCE 222; RECOGNIZANCE 8; SCHOOLS; VARIANCE 1.

REFERENCE.

1. If it do not appear from the rule of reference of a case, that the referee was required to decide the case upon strictly legal ground, nor from his report, that he intended so to decide it, his report will not be set aside, though he may have mistaken the law in his decision. *Steen et al. v. Wardsworth*, 297.
2. If the county court have not original jurisdiction of an action commenced in that court, yet, if the parties mutually agree to a reference of the action, under an order of court, and it is referred, the objection on account of the want of jurisdiction is thereby waived. *Maxfield v. Scott*, 634.

REVIEW.

1. The defendant filed a plea in offset to the plaintiff's demand, but, at the first

trial, submitted no proof in support thereof, and the plaintiff recovered a judgment for his whole claim. The defendant then, by leave of court, filed an additional plea in offset, founded upon the same subject matter, and, at a subsequent term, introduced evidence, and so far sustained his offset, that the plaintiff recovered judgment for but a part of his claim; and it was held that the plaintiff was not entitled to a review. *Chezman v. Lane*, 68.

2. When judgment, in the county court, is rendered in favor of the defendant, upon demurrer, without his having exercised, or waived, his right of review, in a case, in which, if judgment were rendered against him, there could be no controversy as to the amount of damages, and the plaintiff excepts, and the judgment is reversed by the supreme court, the supreme court will proceed to assess the damages, and will not allow the defendant to review. *Semb. Pettee et al. v. Bank of Whitehall*, 435.

See RECOGNIZANCE 1, 2; WRIT OF REVIEW.

SALE.

1. A contract of sale, upon condition, vests no title in the vendee until the performance of such condition, unless the performance is waived. *Mamcell, Adm'r, v. Briggs*, 176.
2. A mere mental determination to rest satisfied with the non-performance of such condition, not procured by the vendee nor notified to him, will not operate as a waiver of such condition, so as to vest the property in the article sold in the vendee. *Ib.*
3. A concurrent possession of personal property by the vendor and vendee, after the sale of the property, renders the sale fraudulent *per se*, as to the creditors of the vendor; but the joint possession, to have that effect, must appear to be of the same description, in the use, occupancy and disposition of the property, as that of joint owners. *Hall v. Parsons*, 271.
4. What constitutes a concurrent possession is a question of law, to be determined by the court; but the jury must decide what facts, tending to show such possession, are established by the evidence. *Ib.*
5. And the same change of possession, which is required in case of the sale of personal property, is required where personal property is assigned for the benefit of the assignee, as creditor of the assignor, and, after payment of his claims, for the benefit of the creditors generally of the assignor. *Ib.*
6. But where the property assigned, in such case, consisted of a store of goods, and the assignee was the owner of the store, and of the land on which it stood, and, immediately upon the execution of the assignment, took down the sign of the assignor, and hired anew the clerk who had been before employed by the assignor, and took the control of the store, and opened a new set of books, and was present personally in the store most of the time after the assignment, attending to the business of the store, and until the time the goods were attached as the property of the assignor, it was held that a joint possession by the assignee and assignor, sufficient to render the sale fraudulent in law as against the creditors of the assignor, was not established by proof that the assignor, after the assignment, continued in the store, and

assisted in making an inventory of the goods, and that he, and the clerk previously employed by him, continued, while making the inventory, to sell goods to the customers, and that, when the inventory was completed, the assignor took the books to his own house and posted them, and made settlements with those who had accounts thereon, and, when balances were found against him, gave memoranda of the amount, to be carried to the store, where the amount was paid in goods, and that, after about a week, the books were returned to the store, and from that time the assignor was in the store, settling with his customers, taking notes and pay for balances due, and, when the balances were against him, paying therefor in goods out of the store, and also, by the consent of the assignee, paying in goods from the store his outstanding due bills which were made payable in goods, and that he sold goods, and waited upon customers, and took goods for the use of his family, which were charged to him upon the books of the assignee, and had, in many instances, the sole charge and care of the store, selling goods and taking pay, in the absence of the assignee and of the clerk. *Id.*

7. The declarations of the vendor of personal property, as to the character of the sale made by him, are not evidence against the vendee, in an action of trespass brought by the vendee against the creditors of the vendor, who have attached the property as belonging to the vendor, notwithstanding such declarations were made before the attachment, and while the vendor still retained the property in his possession. *Ellis v. Howard et al.*, 330.
8. Where a sleigh, in an unfinished state, was in the shop of a painter, who was to finish it by a time specified, and the owner of the sleigh went to the shop with the plaintiff and there sold the sleigh to the plaintiff at a price agreed upon, and no payment was made, and the sleigh was not then actually delivered to the plaintiff, but it was agreed that the sleigh, when finished, should be delivered to the plaintiff, and the painter, who was present, was directed to deliver the sleigh, when finished, to the plaintiff, and agreed to do so, it was held that the plaintiff might maintain trespass against the defendant, a sheriff, who attached and took away the sleigh, before it was finished, upon a writ of attachment against the vendor. *Willard v. Lath*, 412.

See ASSIGNMENT 2; CONTRACT 11, 12.

SCHOOL DISTRICT.

1. It is necessary that the warning for a meeting of a school district should be recorded by the district clerk. *Sherwin v. Bugbee*, 337.
2. If it do not appear from the record of the warning, in such case, that the hour of the day for the meeting was specified in the warning, the defect cannot be supplied by parol evidence, that, in the original warning, the hour for the meeting was named. *Id.*
3. Nor can the collector of a tax, raised at such meeting, who seeks to justify the taking of property by virtue of his warrant, be allowed to supply such defect in the record by parol evidence, that all the legal voters in the district were present at such meeting, and voted upon the question of raising the tax. *Id.*

4. Any fact, which should be matter of record, should be proved by the record. *Id.*

SCIRE FACIAS, *See* RECOGNIZANCE 1, 2.

SET OFF, *See* BOOK ACCOUNT 9, 10, 11; CHANCERY 23; REVIEW; TRUSTEE PROCESS 11.

SETTLEMENT, *See* POOR.

SETTLEMENT OF ESTATES, *See* PROBATE COURT.

SHERIFF.

1. An officer, when serving a writ and attaching property, acts as the agent of the plaintiff; and when the parties to the writ have dissolved the attachment by settling the suit, the officer has no farther lien upon the property attached, and has no right to retain it in his hands as security for his services. *Felker v. Emerson*, 101.
 2. Where a creditor puts a writ of attachment against his debtor into the hands of a sheriff, and directs the sheriff to attach certain property as the property of the debtor, and tenders to him a suitable bond of indemnity for so doing, and the sheriff refuses to attach the property, the creditor cannot sustain an action against the sheriff for such refusal, if the property, which the sheriff was directed to attach, was in fact the property of a person other than the debtor. *Hutchinson et al. v. Lull*, 133.
 3. A contract entered into to indemnify a sheriff for a past neglect is not void for illegality. *Hall v. Hinton*, 244.
- See* ATTACHMENT 1-4; EVIDENCE 18; EXECUTION 5; FEES; PROCESS 1; PROMISSORY NOTES 12; TRUSTEE PROCESS 2, 4.

SLANDER.

1. Where the declaration, in an action for slander, consisted of two counts, the one for words charging the plaintiff with perjury, and the other for words charging him with theft, and the plaintiff introduced evidence in support of both counts, it was held that he might, at any time before verdict, abandon one count, and that there was no error in the court in permitting him to do so, and in directing the jury to lay out of the case all the testimony, applicable to that count, which had been introduced. *Kirkaldie v. Page*, 256.
2. Where, in an action for slanderous words, there was an attempt on the part of the defendant to impeach the credit of the witnesses by whom the speaking was proved, it was held that the plaintiff was entitled to prove, as tending to sustain the credibility of the witnesses, that the witnesses resided in the State of New York, and that the defendant had, by *solicitation, money, and threats*, endeavored to induce them to decline attending court and testifying in the case. *HEARD, J., dissenting. Id.*

3. But such testimony would not be admissible, to prove *malice* on the part of the defendant. *Ib.*

STATUTE.

1. The statute, which requires a certificate to be made upon a writ of the "day, month and year when the same was signed," is one affecting the remedy,—and the statute in force at the time the action is commenced must govern. *Pollard, q. t., v. Wilder*, 48.
2. Where a statute prohibits any thing to be done, an act done in contravention of the prohibition must be adjudged void and inoperative, if the statute cannot otherwise be made effectual to accomplish the object intended by its enactment. *Nelson v. Denison*, 73.
3. In the construction of a statute regard must be had to the intention of the makers of it; and this intention, many times, is to be ascertained from the occasion or necessity of making the statute. *Dutton v. Ft. Mutual Fire Ins. Co.*, 369.
4. The history of the legislation, in the State, in reference to the subject matter of a particular statute, may be referred to, as tending to aid in the construction to be given to the statute. *Henry v. Tilton*, 479.
5. Where the literal interpretation of a statute would lead to a gross absurdity of restriction, the court will extend its application to cases within the same equity, though at the expense of *forcing* the construction of the words. *Ib.*
6. That a complaint for bastardy concludes with praying that the defendant may be made to answer, &c., agreeable to a certain statute law of this state, describing it, which statute was in fact repealed before the complaint was made, is no ground for objection,—the complaint being sufficient without any reference to the statute. The court will take notice of the general statutes of the state. *Blood v. Morrill et al.*, 598.

See ACTIONS PENAL 9.

SURPRISE, *See* NEW TRIAL.

TAXES.

1. A recital, in the deed of a collector of a land tax, that "he has in all things pursued the directions of the statute," is not *prima facie* evidence of such fact; but the person claiming under such deed must show that every substantial requisite of the law was complied with. *Brown et al. v. Wright*, 97.
2. When no possession has been taken under such deed, no presumption in its favor can be claimed from its antiquity,—but rather the contrary. *Ib.*
3. If the warrant to such collector mis-recited the time at which the statute was enacted, by virtue of which the tax was levied, the warrant is void, and the collector's deed of land sold under it will convey no title. *Ib.*
4. Under the third section of the statute of 1807, relative to the sale of lands for non-payment of taxes, which required the town clerk to record, within a specified time after the sale, "the advertisements at length, and the title, the volume, the number and the date of the papers in which they were inserted,"

it was held that a record of such advertisements, made by the town clerk from the copy of the same, certified by him, in the sales book of the collector, was not a compliance with the statute, and that the collector's deed of land sold, when the record had been thus made, was of no effect to prove the title;—and it was held that the fact that the record was thus made might be shown by the parol evidence of the town clerk who made the record. *Carpenter v. Sawyer et al.*, 121.

5. Where, in order to prove that the collector of a land tax had executed a bond to the committee appointed to superintend the expenditure of the tax, as required by statute, the bond itself was produced, it was held that its execution might be proved by one of the committee, to whom it was executed, and that it was not necessary to call the subscribing witnesses, although they were living, and within reach of process. *Chandler v. Caswell*, 580.
6. Personal property, not in the possession of a tenant, is to be taxed in the town, in which the owner resides. The fifteenth section of the statute relating to the general list,—Rev. St. 544,—does not furnish a different rule, as to the property therein specified, where the owner resides in this state. *Blood v. Sayre*, 609.
7. And it makes no difference, that the person assessed consented that the property should be set to him in the list of a town where he does not reside, and that he gave to the listers, in such town, a list, specifying the particular property thereon. *Ib.*
8. In this case, the plaintiff, who was an inhabitant of the town of N., was the owner of a stallion, which he was intending to keep, during the summer of 1840, in the towns of N. and T., and, prior to the first day of April, 1840, he took the horse to T., and kept him there until sometime after that day, with the intention of having the horse set to him in the list of that town; and in the month of April he gave in his list to the listers of T., specifying the horse, and the same was incorporated by them in the grand list of the town. Subsequently the horse was set to the list of the plaintiff in the town of N., where he resided, and he was compelled to pay taxes on him there; of which fact he apprised the defendant, who was constable of T., when he called upon the plaintiff for the taxes assessed against him on the list which he had given to the listers in T. And it was held that the proceedings of the listers in T. were illegal, and that the assessment of the tax against the plaintiff was void, and that the plaintiff might maintain an action of trover against the defendant for property distrained by him to satisfy said tax. *Ib.*

See FEES.

TENANCY IN COMMON.

1. In case of tenancy in common of real estate, the right of part of the tenants to recover in ejectment is not affected by the fact that the rights of their co-tenants are barred by the operation of the statute of limitations. *McFarland, Adm'r, v. Stone*, 165.

See EJECTMENT 3.

TENANT BY THE CURTESY, *See* DEED; ATTACHMENT.

TENDER.

1. When a person indebted to another makes a tender of the sum due, which is refused, and an action is afterwards commenced before a justice of the peace, the party making the tender must plead it specially at the trial before the justice, if he intend to rely upon it;—it is not sufficient that he *offer* to produce the money before the justice, but neglect to do so, in consequence of the other party's saying to him that that was not what he wanted, that he wanted more, and that it was of no consequence. *Griffin v. Tyson*, 35.
2. A tender of performance of a condition precedent, as the payment of a note, entitles the party to a performance on the other side; and no farther offer is required, nor is it necessary to bring the money into court, until the defendant demands it. *Washburn et ux. v. Dewey*, 92.
3. If, upon a note payable in leather on a given day, the defendant turn out leather unsealed, which, by law, is required to be sealed before it is offered for sale, or if he turn out leather which has been sealed as bad leather, such tender cannot avail the defendant as a bar to an action on the note. *Ellis v. Parkhurst*, 105.
4. The plaintiff, in ejectment, must have a right of action at the time of final judgment. If, therefore, the action be founded upon a mortgage, and the defendant, at any time before final judgment, tender to the plaintiff the amount due upon the debt secured by the mortgage and the costs in the action of ejectment, the plaintiff's right of action upon the mortgage is taken away, and he can no longer claim judgment in his favor, in the ejectment. *McDaniels v. Reed et al.*, 674.
5. And if the plaintiff, in such case, claim title to the demanded premises by virtue of several mortgage deeds, which describe distinct parcels of land, and were given to secure distinct debts, the tender may be made of the amount due upon the debts secured by part of the mortgage deeds, and the plaintiff's right of action, as to the premises described in those deeds, will thereby be taken away; and it makes no difference, in this respect, whether the deeds were originally executed to different individuals, and have come to the present plaintiff by assignment, or, *Per* HEBARD, J., whether they were all originally given to the plaintiff. *Ib.*
6. And it is not necessary that the defendant, in such case, having made a legal tender, should show that the tender has been kept good, and bring the money into court; it is sufficient, to entitle him to a recovery, for him to prove the making of the tender, and the refusal, on the part of the plaintiff, to receive it. *Ib.*

See EJECTMENT 10.

TIME, *See* EJECTMENT 11; EVIDENCE 28; WRIT OF REVIEW.

TOWN CLERK, *See* EVIDENCE 28.

TOWNS, *See* LICENSE 1, 2; POOR 1, 2, 3, 7.

TRESPASS.

1. Hay, or grain in the straw, may be attached by the officer's leaving a copy of the writ of attachment in the town clerk's office of the town where the property is situated; and the *leaving such copy* gives to the officer the constructive possession of the property, and title and possession sufficient to enable him to maintain an action therefor against any one who subsequently removes, or converts, the same. *Putnam v. Clark*, 82.
2. It is not necessary, in such case, that the officer see the property, or go near it; and it is sufficient, if the copy of the attachment be left by him with the debtor at any time before the legal time of service upon the writ expires. *Ib.*
3. The officer, in such case, may maintain trespass against another officer, who, subsequent to the leaving the copy in the town clerk's office, and before the copy is delivered to the debtor, attaches and removes the same property by virtue of a legal writ of attachment against the same debtor. *Ib.*
4. In regard to injuries to the person, or to personal property, where the injury is directly inflicted by a forcible act, as where a blow is given to a person, or an act of violence is committed upon his beast, or other property, causing injury, the party aggrieved has generally no choice of actions and trespass is his only remedy; but if he have sustained a forcible injury, effected by means flowing from the act of the defendant, but not operating by the very force and impulse of that act, he may sustain either trespass or case. *Waterman v. Hall et al.*, 128.
5. If the ultimate injury consists neither in the act of the defendant, nor in the continued physical impulse of that act, the plaintiff *may*, as he more frequently *must*, proceed in case. *Ib.*
6. In this case the injury alleged consisted in driving the plaintiff's beast upon a fence, whereby its death was caused, and it was held that either trespass, or case, would lie. *Ib.*
7. Where two creditors sue out separate writs of attachment against the same debtor, and put the writs into the hands of the same officer, who serves them at the same time by attaching upon them the same property of the debtor, they are, *prima facie*, jointly concerned in the taking of the property, and must be so holden, in an action of trespass brought against them and the officer for such taking;—but it is competent for either of the defendants to show that he had no concern in the taking, or that the taking on the two writs was at different times. *Ellis v. Howard et al.*, 330.
8. Where the defendants in an action of trespass had attached the property of the plaintiff as the property of the debtor of two of the defendants, and the attaching officer, who was also made defendant in the action of trespass, had delivered the property to a third person, who executed a receipt therefor, thereby promising to re-deliver the property to the officer upon demand, and the plaintiff commenced his said action of trespass, and then assigned his claim in said action to the said receiptor, and judgment was afterwards duly obtained and execution issued in the suit in which the attachment was made, and the officer having the execution duly demanded the property of

the receiptor, and the receiptor refused to surrender the property, and retained it in his possession, it was held that the defendants, on the trial of the action of trespass, were not entitled to give in evidence, in mitigation of damages, such refusal on the part of the receiptor, they never having offered to surrender to him his receipt, or discharge him from his liability thereon. *Ib.*

9. If persons, having a *limited* judicial authority, do any act beyond the scope of their authority, they make themselves trespassers. *Blood v. Sayre*, 609.

See EX'RS & ADM'RS 6; SALE 8.

TROVER.

1. An administrator, suing in trover, may always declare in his representative capacity, when the property belongs to the estate. And, *Per* REDFIELD, J., if he has once had actual possession of the property, he may maintain an action of trover for it in his own name. *Mamcell, Adm'r, v. Briggs*, 176.
2. If there have been a tortious use, or taking, of property, a subsequent demand of it will not operate as a waiver of such conversion, nor entitle the defendant to prove an offer to return upon such demand. *Ib.*
3. If property be bailed for a specified time, and, before the term expires, the bailee destroy the property, the bailor may sustain trover against him for its value. *Morae v. Crawford*, 499.

See FIXTURES 2; TAXES.

TRUSTEE PROCESS.

1. When one summoned as trustee is adjudged trustee by the county court, the principal debtor in the case may file and prosecute exceptions to such decision. *Hurlburt v. Hicks et al. & Tr.*, 193.
2. A deputy sheriff, who has received an execution for collection, and who has, during its life, collected the money due upon it, may be held as trustee of the execution creditor for the amount so collected, if he have it in his hands at the time of the service of the trustee process upon him; and his liability is not affected by the fact that the execution creditor has never demanded of him payment of such money. *Ib.*
3. An attorney who has a demand in his hands for collection at the time of the service of trustee process upon him as trustee of his client, for whom he holds the demand, may be held as trustee of the client, if he collect the money upon the demand after such service, but previous to the making his disclosure. *Ib.*
4. A deputy sheriff held chargeable as trustee for money collected by him on execution, as in *Hurlburt v. Hicks et al. & Tr.*, *ante*, page 193. *Bullard v. Hicks et al. & Tr.*, 198.
5. One summoned as trustee, who discloses a sum of money in his hands belonging to the principal debtor, but that he has been adjudged chargeable as trustee for the same sum in a prior suit against the debtor, must be discharged, and his costs must be taxed against the plaintiff in the suit, and not be deducted from the amount found in his hands. *Ib.*

6. Under the statute of this State, relative to trustee process, a minor may be charged as trustee for any indebtedness to the principal debtor for *necessaries*, or for any specific goods and chattels of the principal debtor in his hands. *BENNETT, J. Wilder et al. v. Eldridge & Tr.*, 226.
7. But it is as necessary that a minor should defend by guardian in a trustee process, as in any other case, and his guardian, if he have one, must be cited in; and if this is not done, the plaintiff must, at his peril, apply to the court to appoint a guardian *ad litem*. *Ib.*
8. But if the trustee, though a minor at the time of the service of the trustee process, become of age before disclosure is made, it is not then necessary to appoint a guardian *ad litem*. *Ib.*
9. But where a minor, previous to the service of the trustee process upon him, had purchased of the principal debtor a horse, and given his note therefor, but under an agreement, that, if the horse proved unsound, he might return the horse and receive back the note, and, after the service of the trustee process, and before he became of age, he did rescind the contract and deliver the horse to the principal debtor, and after he became of age he made his disclosure, setting forth these facts, and no guardian had ever appeared for him, or been appointed by the court, it was held that he could not be held chargeable as trustee. *Ib.*
10. Where exceptions are taken to the decision of the county court in discharging a trustee, and the supreme court affirm that judgment, they will also, *pro forma*, affirm the judgment against the principal debtor without costs. *Ib.*
11. Where several trustees, summoned under the trustee statute, disclose a joint indebtedness to the principal debtor, and one of the trustees claims that the principal debtor is indebted to himself and a third person as partners, such individual trustee will not be allowed to set off this claim against the joint indebtedness of himself and his co-trustees. *Wells v. Mace & Tr.*, 503.

See ASSIGNMENT 8; CHANCERY 5.

USE AND OCCUPATION, See LANDLORD & TENANT 5; LICENSE 1.

USURY.

1. To avoid a note for usury, it must be proved that an usurious agreement was made between the parties at the time when the money for which the note was executed was loaned. *Adm'r of Hammond v. Smith*, 231.
2. Proof of payment of usurious interest upon a note affords only presumptive evidence that a previous usurious agreement had been made; and the court, even if they presume that an usurious agreement was made, will not proceed farther, and, from that fact, presume that that agreement was made when the money was loaned; and that testimony alone, unaccompanied by other circumstances, will not be submitted to the jury to weigh. *Ib.*

VARIANCE.

1. It is only in those cases where record proof is vouched as proof of a fact

happening upon a certain day, that the date becomes descriptive of the record and a variance consequently fatal. But where, in a collateral action, it is alleged that an arrest and commitment were made upon a certain day, and, on trial, the allegation is attempted to be proved by the return of the officer who made the arrest, and from that it appears that the arrest was made upon a different day, the variance can have no effect upon the plaintiff's right of recovery. *Henry v. Tison*, 479.

2. The identity of a contract is to be determined by looking at its breach; and so, where the gist of the action is *tort*, in the making false representations knowingly, the inquiry, whether there is a variance between the averment and the proof, turns upon the point whether the same proof constitutes equally a fraud under the averment, and under the representation as in fact made. *West v. Emery*, 583.

See ACTION ON THE CASE 4-6; *CONTRACT* 10-12; *LANDLORD & TENANT* 10; *MISNOMER*; *PLEADING* 6; *RECOGNIZANCE* 11.

VENUE, *See PROCESS* 2.

VERDICT, *See PRACTICE* 1.

VERMONT MUTUAL FIRE INSURANCE COMPANY.

1. The seventh section of the Act of the legislature incorporating the Vermont Mutual Fire Insurance Company, by which a time is limited for commencing actions against the Company for losses by fire, applies to a case, where the directors, after examining a claim for loss, wholly disallow the claim; and the operation of this section, in this respect, is not affected by the statute of Nov. 18, 1839, which specifies the time for payment for such losses. *Dutton v. Vt. Mutual Fire Insurance Co.*, 369.
2. Therefore, where a member of the Company, residing in Windsor County, suffered a loss by fire, and duly notified the company thereof, and the directors, after making an examination of his claim, wholly disallowed the same, and notified him of their determination in January, and more than sixty days before the next term of the county court in either Washington or Windsor County, and he neglected to commence his action against the company for his loss at the next term of either of said courts, it was held that his right of action was barred by the seventh section of the act of incorporation, notwithstanding he was not, by the act of Nov. 18, 1839, entitled to demand payment of said claim until a time subsequent to each of said terms. *Ib.*

WAIVER, *See ACTIONS PENAL* 3; *APPEARANCE* 1; *CRIMINAL LAW* 1; *JURISDICTION* 10; *PARENT & CHILD* 9.

WARNING, *See POOR*.

WARRANT, *See TAXES* 1.

WARRANTY, *See ACTION ON THE CASE* 4-6.

WATER COURSE.

1. Where the course of a stream, running across the land of the defendant to the plaintiff's land, was changed by a sudden and unusual flood, so as to run upon the defendant's land without passing over the plaintiff's land, and the defendant permitted the water to run in the new channel, thus formed, for ten years, it was held that he was bound by his acquiescence, and had no right, after such lapse of time, to obstruct the stream upon his own land, so as to divert it from the new channel into the channel in which it had formerly passed across the plaintiff's land. *Woodbury v. Short*, 389.

WILL

1. A married woman may dispose of her estate by will, by the consent of her husband given in writing under his hand and seal during the coverture. *Fisher, Ex'r, v. Kimball et al.*, 323.
2. And *quære*, whether, in this State, any contract, or consent, by the husband is necessary, in order to render such will valid. *Redfield, J. Ib.*

WITNESS, *See* EVIDENCE.

WRIT OF REVIEW.

1. In the case of a writ of review, which it is provided by statute may be brought within three years "next after the rendition" of the judgment to be affected by it, the day on which the original judgment was rendered is to be excluded, in the computation of the three years. *French v. Wilkins*, 341.

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